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THE TRIAL OF AARON BURR  
From the painting by C. W. Jefferys

# THE AGE OF JEFFERSON AND MARSHALL

PART 1: JEFFERSON AND HIS  
COLLEAGUES

BY ALLEN JOHNSON

PART 2: JOHN MARSHALL AND THE  
CONSTITUTION

BY EDWARD S. CORWIN



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PART I  
JEFFERSON AND HIS COLLEAGUES  
A CHRONICLE  
OF THE VIRGINIA DYNASTY  
BY  
ALLEN JOHNSON

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# JEFFERSON AND HIS COLLEAGUES

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## CHAPTER I

### PRESIDENT JEFFERSON'S COURT

THE rumble of President John Adams's coach had hardly died away in the distance on the morning of March 4, 1801, when Mr. Thomas Jefferson entered the breakfast room of Conrad's boarding house on Capitol Hill, where he had been living in bachelor's quarters during his Vice-Presidency. He took his usual seat at the lower end of the table among the other boarders, declining with a smile to accept the chair of the impulsive Mrs. Brown, who felt, in spite of her democratic principles, that on this day of all days Mr. Jefferson should have the place which he had obstinately refused to occupy at the head of the table and near the fireplace. There were others besides the wife of the Senator from Kentucky who felt that Mr. Jefferson was carrying

equality too far. But Mr. Jefferson would not take precedence over the Congressmen who were his fellow boarders.

Conrad's was conveniently near the Capitol, on the south side of the hill, and commanded an extensive view. The slope of the hill, which was a wild tangle of verdure in summer, debouched into a wide plain extending to the Potomac. Through this lowland wandered a little stream, once known as Goose Creek but now dignified by the name of Tiber. The banks of the stream as well as of the Potomac were fringed with native flowering shrubs and graceful trees, in which Mr. Jefferson took great delight. The prospect from his drawing-room windows, indeed, quite as much as anything else, attached him to Conrad's.

As was his wont, Mr. Jefferson withdrew to his study after breakfast and doubtless ran over the pages of a manuscript which he had been preparing with some care for this Fourth of March. It may be guessed, too, that here, as at Monticello, he made his usual observations—noting in his diary the temperature, jotting down in the garden-book which he kept for thirty years an item or two about the planting of vegetables, and recording, as he continued to do for eight years, the earliest and



latest appearance of each comestible in the Washington market. Perhaps he made a few notes about the "seeds of the cymbling (*cucurbita ver-meosa*) and squash (*cucurbita melopipo*)" which he purposed to send to his friend Philip Mazzei, with directions for planting; or even wrote a letter full of reflections upon bigotry in politics and religion to Dr. Joseph Priestley, whom he hoped soon to have as his guest in the President's House.

Toward noon Mr. Jefferson stepped out of the house and walked over to the Capitol — a tall, rather loose-jointed figure, with swinging stride, symbolizing, one is tempted to think, the angularity of the American character. "A tall, large-boned farmer," an unfriendly English observer called him. His complexion was that of a man constantly exposed to the sun — sandy or freckled, contemporaries called it — but his features were clean-cut and strong and his expression was always kindly and benignant.

Aside from salvos of artillery at the hour of twelve, the inauguration of Mr. Jefferson as President of the United States was marked by extreme simplicity. In the Senate chamber of the unfinished Capitol, he was met by Aaron Burr, who had already been installed as presiding officer, and

conducted to the Vice-President's chair, while that debonair man of the world took a seat on his right with easy grace. On Mr. Jefferson's left sat Chief Justice John Marshall, a "tall, lax, lounging Virginian," with black eyes peering out from his swarthy countenance. There is a dramatic quality in this scene of the President-to-be seated between two men who are to cause him more vexation of spirit than any others in public life. Burr, brilliant, gifted, ambitious, and profligate; Marshall, temperamentally and by conviction opposed to the principles which seemed to have triumphed in the election of this radical Virginian, to whom indeed he had a deep-seated aversion. After a short pause, Mr. Jefferson rose and read his Inaugural Address in a tone so low that it could be heard by only a few in the crowded chamber.

Those who expected to hear revolutionary doctrines must have been surprised by the studied moderation of this address. There was not a Federalist within hearing of Jefferson's voice who could not have subscribed to all the articles in this profession of political faith. "Equal and exact justice to all men" — "a jealous care of the right of election by the people" — "absolute acquiescence in the decisions of the majority" — "the supremacy

of the civil over the military authority" — "the honest payments of our debts" — "freedom of religion" — "freedom of the press" — "freedom of person under the protection of the habeas corpus" — what were these principles but the bright constellation, as Jefferson said, "which has guided our steps through an age of revolution and reformation?" John Adams himself might have enunciated all these principles, though he would have distributed the emphasis somewhat differently.

But what did Jefferson mean when he said, "We have called by different names brethren of the same principle. We are all Republicans — we are all Federalists." If this was true, what, pray, became of the revolution of 1800, which Jefferson had declared "as real a revolution in the principles of our government as that of 1776 was in its form?" Even Jefferson's own followers shook their heads dubiously over this passage as they read and re-read it in the news-sheets. It sounded a false note while the echoes of the campaign of 1800 were still reverberating. If Hamilton and his followers were monarchists at heart in 1800, bent upon overthrowing the Government, how could they and the triumphant Republicans be brethren of the same principle in 1801?

The truth of the matter is that Jefferson was holding out an olive branch to his political opponents. He believed, as he remarked in a private letter, that many Federalists were sound Republicans at heart who had been stampeded into the ranks of his opponents during the recent troubles with France. These lost political sheep Jefferson was bent upon restoring to the Republican fold by avoiding utterances and acts which would offend them. "I always exclude the leaders from these considerations," he added confidentially. In short, this Inaugural Address was less a great state paper, marking a broad path for the Government to follow under stalwart leadership, than an astute effort to consolidate the victory of the Republican party.

Disappointing the address must have been to those who had expected a declaration of specific policy. Yet the historian, wiser by the march of events, may read between the lines. When Jefferson said that he desired a wise and frugal government — a government "which should restrain men from injuring one another but otherwise leave them free to regulate their own pursuits —" and when he announced his purpose "to support the state governments in all their rights" and to cultivate "peace with all nations — entangling alliances

with none," he was in effect formulating a policy. But all this was in the womb of the future.

It was many weeks before Jefferson took up his abode in the President's House. In the interval he remained in his old quarters, except for a visit to Monticello to arrange for his removal, which indeed he was in no haste to make, for "The Palace," as the President's House was dubbed satirically, was not yet finished; its walls were not fully plastered, and it still lacked the main staircase — which, it must be admitted, was a serious defect if the new President meant to hold court. Besides, it was inconveniently situated at the other end of the straggling, unkempt village. At Conrad's Jefferson could still keep in touch with those members of Congress and those friends upon whose advice he relied in putting "our Argosie on her Republican tack," as he was wont to say. Here, in his drawing-room, he could talk freely with practical politicians such as Charles Pinckney, who had carried the ticket to success in South Carolina and who might reasonably expect to be consulted in organizing the new Administration.

The chief posts in the President's official household, save one, were readily filled. There were

only five heads of departments to be appointed, and of these the Attorney-General might be described as a head without a department, since the duties of his office were few and required only his occasional attention. As it fell out, however, the Attorney-General whom Jefferson appointed, Levi Lincoln of Massachusetts, practically carried on the work of all the Executive Departments until his colleagues were duly appointed and commissioned. For Secretary of War Jefferson chose another reliable New Englander, Henry Dearborn of Maine. The naval portfolio went begging, perhaps because the navy was not an imposing branch of the service, or because the new President had announced his desire to lay up all seven frigates in the eastern branch of the Potomac, where "they would be under the immediate eye of the department and would require but one set of plunderers to look after them." One conspicuous Republican after another declined this dubious honor, and in the end Jefferson was obliged to appoint as Secretary of the Navy Robert Smith, whose chief qualification was his kinship to General Samuel Smith, an influential politician of Maryland.

The appointment by Jefferson of James Madison as Secretary of State occasioned no surprise, for the

intimate friendship of the two Virginians and their long and close association in politics led every one to expect that he would occupy an important post in the new Administration, though in truth that friendship was based on something deeper and finer than mere agreement in politics. "I do believe," exclaimed a lady who often saw both men in private life, "father never loved son more than Mr. Jefferson loves Mr. Madison." The difference in age, however, was not great, for Jefferson was in his fifty-eighth year and Madison in his fiftieth. It was rather mien and character that suggested the filial relationship. Jefferson was, or could be if he chose, an imposing figure; his stature was six feet two and one-half inches. Madison had the ways and habits of a little man, for he was only five feet six. Madison was naturally timid and retiring in the presence of other men, but he was at his best in the company of his friend Jefferson, who valued his attainments. Indeed, the two men supplemented each other. If Jefferson was prone to theorize, Madison was disposed to find historical evidence to support a political doctrine. While Jefferson generalized boldly, even rashly, Madison hesitated, temporized, weighed the pros and cons, and came with difficulty to a conclusion. Unhappily neither



was a good judge of men. When pitted against a Bonaparte, a Talleyrand, or a Canning, they appeared provincial in their ways and limited in their sympathetic understanding of statesmen of the Old World.

Next to that of Madison, Jefferson valued the friendship of Albert Gallatin, whom he made Secretary of the Treasury by a recess appointment, since there was some reason to fear that the Federalist Senate would not confirm the nomination. The Federalists could never forget that Gallatin was a Swiss by birth — an alien of supposedly radical tendencies. The partisan press never exhibited its crass provincialism more shamefully than when it made fun of Gallatin's imperfect pronunciation of English. He had come to America, indeed, too late to acquire a perfect control of a new tongue, but not too late to become a loyal son of his adopted country. He brought to Jefferson's group of advisers not only a thorough knowledge of public finance but a sound judgment and a statesman-like vision, which were often needed to rectify the political vagaries of his chief.

The last of his Cabinet appointments made, Jefferson returned to his country seat at Monticello for August and September, for he was determined

not to pass those two "bilious months" in Washington. "I have not done it these forty years," he wrote to Gallatin. "Grumble who will, I will never pass those two months on tidewater." To Monticello, indeed, Jefferson turned whenever his duties permitted and not merely in the sickly months of summer, for when the roads were good the journey was rapidly and easily made by stage or chaise. There, in his garden and farm, he found relief from the distractions of public life. "No occupation is so delightful to me," he confessed, "as the culture of the earth, and no culture comparable to that of the garden." At Monticello, too, he could gratify his delight in the natural sciences, for he was a true child of the eighteenth century in his insatiable curiosity about the physical universe and in his desire to reduce that universe to an intelligible mechanism. He was by instinct a rationalist and a foe to superstition in any form, whether in science or religion. His indefatigable pen was as ready to discuss vaccination and yellow fever with Dr. Benjamin Rush as it was to exchange views with Dr. Priestley on the ethics of Jesus.

The diversity of Jefferson's interests is truly remarkable. Monticello is a monument to his

almost Yankee-like ingenuity. He writes to his friend Thomas Paine to assure him that the semi-cylindrical form of roof after the De Lorme pattern, which he proposes for his house, is entirely practicable, for he himself had "used it at home for a dome, being  $120^{\circ}$  of an oblong octagon." He was characteristically American in his receptivity to new ideas from any source. A chance item about Eli Whitney of New Haven arrests his attention and forthwith he writes to Madison recommending a "Mr. Whitney at Connecticut, a mechanic of the first order of ingenuity, who invented the cotton-gin," and who has recently invented "molds and machines for making all the pieces of his [musket] locks so exactly equal that take one hundred locks to pieces and mingle their parts and the hundred locks may be put together as well by taking the first pieces which come to hand." To Robert Fulton, then laboring to perfect his torpedoes and submarine, Jefferson wrote encouragingly: "I have ever looked to the submarine boat as most to be depended on for attaching them [*i. e.*, torpedoes] . . . I am in hopes it is not to be abandoned as impracticable."

It was not wholly affectation, therefore, when Jefferson wrote, "Nature intended me for the

tranquil pursuits of science, by rendering them my supreme delight. But the enormities of the times in which I have lived, have forced me to take a part in resisting them, and to commit myself on the boisterous ocean of political passions." One can readily picture this Virginia farmer-philosopher ruefully closing his study door, taking a last look over the gardens and fields of Monticello, in the golden days of October, and mounting Wildair, his handsome thoroughbred, setting out on the dusty road for that little political world at Washington, where rumor so often got the better of reason and where gossip was so likely to destroy philosophic serenity.

Jefferson had been a widower for many years; and so, since his daughters were married and had households of their own, he was forced to preside over his ménage at Washington without the feminine touch and tact so much needed at this American court. Perhaps it was this unhappy circumstance quite as much as his dislike for ceremonies and formalities that made Jefferson do away with the weekly levees of his predecessors and appoint only two days, the First of January and the Fourth of July, for public receptions. On such occasions

he begged Mrs. Dolly Madison to act as hostess; and a charming and gracious figure she was, casting a certain extenuating veil over the President's gaucheries. Jefferson held, with his many political heresies, certain theories of social intercourse which ran rudely counter to the prevailing etiquette of foreign courts. Among the rules which he devised for his republican court, the precedence due to rank was conspicuously absent, because he held that "all persons when brought together in society are perfectly equal, whether foreign or domestic, titled or untitled, in or out of office." One of these rules to which the Cabinet gravely subscribed read as follows:

To maintain the principles of equality, or of *pêle môle*, and prevent the growth of precedence out of courtesy, the members of the Executive will practise at their own houses, and recommend an adherence to the ancient usage of the country, of gentlemen in mass giving precedence to the ladies in mass, in passing from one apartment where they are assembled into another.

The application of this rule on one occasion gave rise to an incident which convulsed Washington society. President Jefferson had invited to dinner the new British Minister Merry and his wife, the Spanish Minister Yrujo and his wife, the French

Minister Pichon and his wife, and Mr. and Mrs. Madison. When dinner was announced, Mr. Jefferson gave his hand to Mrs. Madison and seated her on his right, leaving the rest to straggle in as they pleased. Merry, fresh from the Court of St. James, was aghast and affronted; and when a few days later, at a dinner given by the Secretary of State, he saw Mrs. Merry left without an escort, while Mr. Madison took Mrs. Gallatin to the table, he believed that a deliberate insult was intended. To appease this indignant Briton the President was obliged to explain officially his rule of "pêle mêle"; but Mrs. Merry was not appeased and positively refused to appear at the President's New Year's Day reception. "Since then," wrote the amused Pichon, "Washington society is turned upside down; all the women are to the last degree exasperated against Mrs. Merry; the Federalist newspapers have taken up the matter, and increased the irritations by sarcasms on the administration and by making a burlesque of the facts." Then Merry refused an invitation to dine again at the President's, saying that he awaited instructions from his Government; and the Marquis Yrujo, who had reasons of his own for fomenting trouble, struck an alliance with the Merrys and also declined the

President's invitation. Jefferson was incensed at their conduct, but put the blame upon Mrs. Merry, whom he characterized privately as a "virago who has already disturbed our harmony extremely."

A brilliant English essayist has observed that a government to secure obedience must first excite reverence. Some such perception, coinciding with native taste, had moved George Washington to assume the trappings of royalty, in order to surround the new presidential office with impressive dignity. Posterity has, accordingly, visualized the first President and Father of his Country as a statuesque figure, posing at formal levees with a long sword in a scabbard of white polished leather, and clothed in black velvet knee-breeches, with yellow gloves and a cocked hat. The third President of the United States harbored no such illusions and affected no such poses. Governments were made by rational beings — "by the consent of the governed," he had written in a memorable document — and rested on no emotional basis. Thomas Jefferson remained Thomas Jefferson after his election to the chief magistracy; and so contemporaries saw him in the President's House, an unimpressive figure clad in "a blue coat, a thick gray-colored hairy waistcoat, with a red underwaist



lapped over it, green velveteen breeches, with pearl buttons, yarn stockings, and slippers down at the heels." Any one might have found him, as Senator Maclay did, sitting "in a lounging manner, on one hip commonly, and with one of his shoulders elevated much above the other," a loose, shackling figure with no pretense at dignity.

In his dislike for all artificial distinctions between man and man, Jefferson determined from the outset to dispense a true Southern hospitality at the President's House and to welcome any one at any hour on any day. There was therefore some point to John Quincy Adams's witticism that Jefferson's "whole eight years was a levee." No one could deny that he entertained handsomely. Even his political opponents rose from his table with a comfortable feeling of satiety which made them more kindly in their attitude toward their host. "We sat down at the table at four," wrote Senator Plumer of New Hampshire, "rose at six, and walked immediately into another room and drank coffee. We had a very good dinner, with a profusion of fruits and sweetmeats. The wine was the best I ever drank, particularly the champagne, which was indeed delicious."

It was in the circle of his intimates that Jefferson

appeared at his best, and of all his intimate friends Madison knew best how to evoke the true Jefferson. To outsiders Madison appeared rather taciturn, but among his friends he was genial and even lively, amusing all by his ready humor and flashes of wit. To his changes of mood Jefferson always responded. Once started Jefferson would talk on and on, in a loose and rambling fashion, with a great deal of exaggeration and with many vagaries, yet always scattering much information on a great variety of topics. Here we may leave him for the moment, in the exhilarating hours following his inauguration, discoursing with Pinckney, Gallatin, Madison, Burr, Randolph, Giles, Macon, and many another good Republican, and evolving the policies of his Administration.

## CHAPTER II

### PUTTING THE SHIP ON HER REPUBLICAN TACK

PRESIDENT JEFFERSON took office in a spirit of exultation which he made no effort to disguise in his private letters. "The tough sides of our Argosie," he wrote to John Dickinson, "have been thoroughly tried. Her strength has stood the waves into which she was steered with a view to sink her. We shall put her on her Republican tack, and she will now show by the beauty of her motion the skill of her builders." In him as in his two intimates, Gallatin and Madison, there was a touch of that philosophy which colored the thought of reformers on the eve of the French Revolution, a naïve confidence in the perfectability of man and the essential worthiness of his aspirations. Strike from man the shackles of despotism and superstition and accord to him a free government, and he would rise to unsuspected felicity. Republican government was the strongest government on earth, because it was founded on

free will and imposed the fewest checks on the legitimate desires of men. Only one thing was wanting to make the American people happy and prosperous, said the President in his Inaugural Address: "a wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned." This, he believed, was the sum of good government; and this was the government which he was determined to establish. Whether government thus reduced to lowest terms would prove adequate in a world rent by war, only the future could disclose.

It was only in intimate letters and in converse with Gallatin and Madison that Jefferson revealed his real purposes. So completely did Jefferson take these two advisers into his confidence, and so loyal was their coöperation, that the Government for eight years has been described as a triumvirate almost as clearly defined as any triumvirate of Rome. Three more congenial souls certainly have never ruled a nation, for they were drawn together not merely by agreement on a common policy but by sympathetic understanding of the fundamental principles of government. Gallatin and Madison

often frequented the President's House, and there one may see them in imagination and perhaps catch now and then a fragment of their conversation:

*Gallatin:* We owe much to geographical position; we have been fortunate in escaping foreign wars. If we can maintain peaceful relations with other nations, we can keep down the cost of administration and avoid all the ills which follow too much government.

*The President:* After all, we are chiefly an agricultural people and if we shape our policy accordingly we shall be much more likely to multiply and be happy than as if we mimicked an Amsterdam, a Hamburg, or a city like London.

*Madison (quietly):* I quite agree with you. We must keep the government simple and republican, avoiding the corruption which inevitably prevails in crowded cities.

*Gallatin (pursuing his thought):* The moment you allow the national debt to mount, you entail burdens on posterity and augment the operations of government.

*The President (bitterly):* The principle of spending money to be paid by posterity is but swindling futurity on a large scale. That was what Hamilton——

*Gallatin:* Just so; and if this administration does not reduce taxes, they will never be reduced. We must strike at the root of the evil and avert the danger of multiplying the functions of government. I would repeal all internal taxes. These pretended tax-preparations, treasure-preparations, and army-preparations against contingent wars tend only to encourage wars.

*The President (nodding his head in agreement):* The discharge of the debt is vital to the destinies of our government, and for the present we must make all objects subordinate to this. We must confine our general government to foreign concerns only and let our affairs be disentangled from those of all other nations, except as to commerce. And our commerce is so valuable to other nations that they will be glad to purchase it, when they know that all we ask is justice. Why, then, should we not reduce our general government to a very simple organization and a very unexpensive one — a few plain duties to be performed by a few servants?

It was precisely the matter of selecting these few servants which worried the President during his first months in office, for the federal offices were held by Federalists almost to a man. He hoped that he would have to make only a few removals:

any other course would expose him to the charge of inconsistency after his complacent statement that there was no fundamental difference between Republicans and Federalists. But his followers thought otherwise; they wanted the spoils of victory and they meant to have them. Slowly and reluctantly Jefferson yielded to pressure, justifying himself as he did so by the reflection that a due participation in office was a matter of right. And how, pray, could due participation be obtained, if there were no removals? Deaths were regrettably few; and resignations could hardly be expected. Once removals were decided upon, Jefferson drifted helplessly upon the tide. For a moment, it is true, he wrote hopefully about establishing an equilibrium and then returning "with joy to that state of things when the only questions concerning a candidate shall be: Is he honest? Is he capable? Is he faithful to the Constitution?" That blessed expectation was never realized. By the end of his second term, a Federalist in office was as rare as a Republican under Adams.

The removal of the Collector of the Port at New Haven and the appointment of an octogenarian whose chief qualification was his Republicanism brought to a head all the bitter animosity of

Federalist New England. The hostility to Jefferson in this region was no ordinary political opposition, as he knew full well, for it was compounded of many ingredients. In New England there was a greater social solidarity than existed anywhere else in the Union. Descended from English stock, imbued with common religious and political traditions, and bound together by the ties of a common ecclesiastical polity, the people of this section had, as Jefferson expressed it, "a sort of family pride." Here all the forces of education, property, religion, and respectability were united in the maintenance of the established order against the assaults of democracy. New England Federalism was not so much a body of political doctrine as a state of mind. Abhorrence of the forces liberated by the French Revolution was the dominating emotion. To the Federalist leaders democracy seemed an aberration of the human mind, which was bound everywhere to produce infidelity, looseness of morals, and political chaos. In the words of their Jeremiah, Fisher Ames, "Democracy is a troubled spirit, fated never to rest, and whose dreams, if it sleeps, present only visions of hell." So thinking and feeling, they had witnessed the triumph of Jefferson with genuine alarm, for Jefferson they held to be no better than



a Jacobin, bent upon subverting the social order and saturated with all the heterodox notions of Voltaire and Thomas Paine.

The appointment of the aged Samuel Bishop as Collector of New Haven was evidence enough to the Federalist mind, which fed upon suspicion, that Jefferson intended to reward his son, Abraham Bishop, for political services. The younger Bishop was a stench in their nostrils, for at a recent celebration of the Republican victory he had shocked the good people of Connecticut by characterizing Jefferson as "the illustrious chief who, once insulted, now presides over the Union," and comparing him with the Saviour of the world, "who, once insulted, now presides over the universe." And this had not been his first transgression: he was known as an active and intemperate rebel against the standing order. No wonder that Theodore Dwight voiced the alarm of all New England Federalists in an oration at New Haven, in which he declared that according to the doctrines of Jacobinism "the greatest villain in the community is the fittest person to make and execute the laws." "We have now," said he, "reached the consummation of democratic blessedness. We have a country governed by blockheads and knaves." Here was an

opposition which, if persisted in, might menace the integrity of the Union.

Scarcely less vexatious was the business of appointments in New York where three factions in the Republican party struggled for the control of the patronage. Which should the President support? Gallatin, whose father-in-law was prominent in the politics of the State, was inclined to favor Burr and his followers; but the President already felt a deep distrust of Burr and finally surrendered to the importunities of DeWitt Clinton, who had formed an alliance with the Livingston interests to drive Burr from the party. Despite the pettiness of the game, which disgusted both Gallatin and Jefferson, the decision was fateful. It was no light matter, even for the chief magistrate, to offend Aaron Burr.

From these worrisome details of administration, the President turned with relief to the preparation of his first address to Congress. The keynote was to be economy. But just how economies were actually to be effected was not so clear. For months Gallatin had been toiling over masses of statistics, trying to reconcile a policy of reduced taxation, to satisfy the demands of the party, with the discharge of the public debt. By laborious calculation

he found that if \$7,300,000 were set aside each year, the debt — principal and interest — could be discharged within sixteen years. But if the unpopular excise were abandoned, where was the needed revenue to be found? New taxes were not to be thought of. The alternative, then, was to reduce expenditures. But how and where?

Under these circumstances the President and his Cabinet adopted the course which in the light of subsequent events seems to have been woefully ill-timed and hazardous in the extreme. They determined to sacrifice the army and navy. In extenuation of this decision, it may be said that the danger of war with France, which had forced the Adams Administration to double expenditures, had passed; and that Europe was at this moment at peace, though only the most sanguine and shortsighted could believe that continued peace was possible in Europe with the First Consul in the saddle. It was agreed, then, that the expenditures for the military and naval establishments should be kept at about \$2,500,000 — somewhat below the normal appropriation before the recent war-flurry; and that wherever possible expenses should be reduced by careful pruning of the list of employees at the navy yards.

Such was the programme of humdrum economy which President Jefferson laid before Congress. After the exciting campaign of 1800, when the public was assured that the forces of Darkness and Light were locked in deadly combat for the soul of the nation, this tame programme seemed like an anticlimax. But those who knew Thomas Jefferson learned to discount the vagaries to which he gave expression in conversation. As John Quincy Adams once remarked after listening to Jefferson's brilliant table talk, "Mr. Jefferson loves to excite wonder." Yet Thomas Jefferson, philosopher, was a very different person from Thomas Jefferson, practical politician. Paradoxical as it may seem, the new President, of all men of his day, was the least likely to undertake revolutionary policies; and it was just this acquaintance with Jefferson's mental habits which led his inveterate enemy, Alexander Hamilton, to advise his party associates to elect Jefferson rather than Burr.

The President broke with precedent, however, in one small particular. He was resolved not to follow the practice of his Federalist predecessors and address Congress in person. The President's speech to the two houses in joint session savored too much of a speech from the throne; it was a symptom of the

Federalist leaning to monarchical forms and practices. He sent his address, therefore, in writing, accompanied with letters to the presiding officers of the two chambers, in which he justified this departure from custom on the ground of convenience and economy of time. "I have had principal regard," he wrote, "to the convenience of the Legislature, to the economy of their time, to the relief from the embarrassment of immediate answers on subjects not yet fully before them, and to the benefits thence resulting to the public affairs." This explanation deceived no one, unless it was the writer himself. It was thoroughly characteristic of Thomas Jefferson that he often explained his conduct by reasons which were obvious afterthoughts — an unfortunate habit which has led his contemporaries and his unfriendly biographers to charge him with hypocrisy. And it must be admitted that his preference for indirect methods of achieving a purpose exposed him justly to the reproaches of those who liked frankness and plain dealing. It is not unfair, then, to wonder whether the President was not thinking rather of his own convenience when he elected to address Congress by written message, for he was not a ready nor an impressive speaker. At all events, he established a precedent

which remained unbroken until another Democratic President, one hundred and twelve years later, returned to the practice of Washington and Adams.

If the Federalists of New England are to be believed, hypocrisy marked the presidential message from the very beginning to the end. It began with a pious expression of thanks "to the beneficent Being" who had been pleased to breathe into the warring peoples of Europe a spirit of forgiveness and conciliation. But even the most bigoted Federalist who could not tolerate religious views differing from his own must have been impressed with the devout and sincere desire of the President to preserve peace. Peace! peace! It was a sentiment which ran through the message like the watermark in the very paper on which he wrote; it was the condition, the absolutely indispensable condition, of every chaste reformation which he advocated. Every reduction of public expenditure was predicated on the supposition that the danger of war was remote because other nations would desire to treat the United States justly. "Salutary reductions in habitual expenditures" were urged in every branch of the public service from the diplomatic and revenue services to the judiciary and the naval yards. War might come, indeed, but "sound

principles would not justify our taxing the industry of our fellow-citizens to accumulate treasure for wars to happen we know not when, and which might not, perhaps, happen but from the temptations offered by that treasure."

On all concrete matters the President's message cut close to the line which Gallatin had marked out. The internal taxes should now be dispensed with and corresponding reductions be made in "our habitual expenditures." There had been unwise multiplication of federal offices, many of which added nothing to the efficiency of the Government but only to the cost. These useless offices should be lopped off, for "when we consider that this Government is charged with the external and mutual relations only of these States, . . . we may well doubt whether our organization is not too complicated, too expensive." In this connection Congress might well consider the Federal Judiciary, particularly the courts newly erected, and "judge of the proportion which the institution bears to the business it has to perform."<sup>1</sup> And finally, Con-

<sup>1</sup> The studied moderation of the message gave no hint of Jefferson's resolute purpose to procure the repeal of the Judiciary Act of 1801. The history of this act and its repeal, as well as of the attack upon the judiciary, is recounted by Edward S. Corwin in *John Marshall and the Constitution* in *The Chronicles of America*.



gress should consider whether the law relating to naturalization should not be revised. "A denial of citizenship under a residence of fourteen years is a denial to a great proportion of those who ask it"; and "shall we refuse to the unhappy fugitives from distress that hospitality which savages of the wilderness extended to our fathers arriving in this land?"

The most inveterate foe could not characterize this message as revolutionary, however much he might dissent from the policies advocated. It was not Jefferson's way, indeed, to announce his intentions boldly and hew his way relentlessly to his objective. He was far too astute as a party leader to attempt to force his will upon Republicans in Congress. He would suggest; he would advise; he would cautiously express an opinion; but he would never dictate. Yet few Presidents have exercised a stronger directive influence upon Congress than Thomas Jefferson during the greater part of his Administration. So long as he was *en rapport* with Nathaniel Macon, Speaker of the House, and with John Randolph, Chairman of the Committee on Ways and Means, he could direct the policies of his party as effectively as the most autocratic dictator. When he had made up his mind that Justice



Samuel Chase of the Supreme Court should be impeached, he simply penned a note to Joseph Nicholson, who was then managing the impeachment of Judge Pickering, raising the question whether Chase's attack on the principles of the Constitution should go unpunished. "I ask these questions for your consideration," said the President deferentially; "for myself, it is better that I should not interfere." And eventually impeachment proceedings were instituted.

In this memorable first message, the President alluded to a little incident which had occurred in the Mediterranean, "the only exception to this state of general peace with which we have been blessed." Tripoli, one of the Barbary States, had begun depredations upon American commerce and the President had sent a small squadron for protection. A ship of this squadron, the schooner *Enterprise*, had fallen in with a Tripolitan man-of-war and after a fight lasting three hours had forced the corsair to strike her colors. But since war had not been declared and the President's orders were to act only on the defensive, the crew of the *Enterprise* dismantled the captured vessel and let her go. Would Congress, asked the President, take under consideration the advisability of placing our forces

on an equality with those of our adversaries? Neither the President nor his Secretary of the Treasury seems to have been aware that this single cloud on the horizon portended a storm of long duration. Yet within a year it became necessary to delay further reductions in the naval establishment and to impose new taxes to meet the very contingency which the peace-loving President declared most remote. Moreover, the very frigates which he had proposed to lay up in the eastern branch of the Potomac were manned and dispatched to the Mediterranean to bring the Corsairs to terms.

## CHAPTER III

### THE CORSAIRS OF THE MEDITERRANEAN

SHORTLY after Jefferson's inauguration a visitor presented himself at the Executive Mansion with disquieting news from the Mediterranean. Captain William Bainbridge of the frigate *George Washington* had just returned from a disagreeable mission. He had been commissioned to carry to the Dey of Algiers the annual tribute which the United States had contracted to pay. It appeared that while the frigate lay at anchor under the shore batteries off Algiers, the Dey attempted to requisition her to carry his ambassador and some Turkish passengers to Constantinople. Bainbridge, who felt justly humiliated by his mission, wrathfully refused. An American frigate do errands for this insignificant pirate? He thought not! The Dey pointed to his batteries, however, and remarked, "You pay me tribute, by which you become my slaves; I have, therefore, a right to order you as I

may think proper.” The logic of the situation was undeniably on the side of the master of the shore batteries. Rather than have his ship blown to bits, Bainbridge swallowed his wrath and submitted. On the eve of departure, he had to submit to another indignity. The colors of Algiers must fly at the masthead. Again Bainbridge remonstrated and again the Dey looked casually at his guns trained on the frigate. So off the frigate sailed with the Dey’s flag fluttering from her masthead, and her captain cursing lustily.

The voyage of fifty-nine days to Constantinople, as Bainbridge recounted it to the President, was not without its amusing incidents. Bainbridge regaled the President with accounts of his Mohammedan passengers, who found much difficulty in keeping their faces to the east while the frigate went about on a new tack. One of the faithful was delegated finally to watch the compass so that the rest might continue their prayers undisturbed. And at Constantinople Bainbridge had curious experiences with the Moslems. He announced his arrival as from the United States of America: he had hauled down the Dey’s flag as soon as he was out of reach of the batteries. The port officials were greatly puzzled. What, pray, were the

United States? Bainbridge explained that they were part of the New World which Columbus had discovered. The Grand Seigneur then showed great interest in the stars of the American flag, remarking that, as his own was decorated with one of the heavenly bodies, the coincidence must be a good omen of the future friendly intercourse of the two nations. Bainbridge did his best to turn his unpalatable mission to good account, but he returned home in bitter humiliation. He begged that he might never again be sent to Algiers with tribute unless he was authorized to deliver it from the cannon's mouth.

The President listened sympathetically to Bainbridge's story, for he was not unfamiliar with the ways of the Barbary Corsairs and he had long been of the opinion that tribute only made these pirates bolder and more insufferable. The Congress of the Confederation, however, had followed the policy of the European powers and had paid tribute to secure immunity from attack, and the new Government had simply continued the policy of the old. In spite of his abhorrence of war, Jefferson held that coercion in this instance was on the whole cheaper and more efficacious.

Not long after this interview with Bainbridge

President Jefferson was warned that the Pasha of Tripoli was worrying the American Consul with importunate demands for more tribute. This African potentate had discovered that his brother, the Dey of Algiers, had made a better bargain with the United States. He announced, therefore, that he must have a new treaty with more tribute or he would declare war. Fearing trouble from this quarter, the President dispatched a squadron of four vessels under Commodore Richard Dale to cruise in the Mediterranean, with orders to protect American commerce. It was the schooner *Enterprise* of this squadron which overpowered the Tripolitan cruiser, as Jefferson recounted in his message to Congress.

The former Pasha of Tripoli had been blessed with three sons, Hasan, Hamet, and Yusuf. Between these royal brothers, however, there seems to have been some incompatibility of temperament, for when their father died (Blessed be Allah!) Yusuf, the youngest, had killed Hasan and had spared Hamet only because he could not lay hands upon him. Yusuf then proclaimed himself Pasha. It was Yusuf, the Pasha with this bloody record, who declared war on the United States, May 10, 1801, by cutting down the flagstaff of the American consulate.

To apply the term war to the naval operations which followed is, however, to lend specious importance to very trivial events. Commodore Dale made the most of his little squadron, it is true, convoying merchantmen through the straits and along the Barbary coast, holding Tripolitan vessels laden with grain in hopeless inactivity off Gibraltar, and blockading the port of Tripoli, now with one frigate and now with another. When the terms of enlistment of Dale's crews expired, another squadron was gradually assembled in the Mediterranean, under the command of Captain Richard V. Morris, for Congress had now authorized the use of the navy for offensive operations, and the Secretary of the Treasury, with many misgivings, had begun to accumulate his Mediterranean Fund to meet contingent expenses.

The blockade of Tripoli seems to have been carelessly conducted by Morris and was finally abandoned. There were undeniably great difficulties in the way of an effective blockade. The coast afforded few good harbors; the heavy northerly winds made navigation both difficult and hazardous; the Tripolitan galleys and gunboats with their shallow draft could stand close in shore and elude the American frigates; and the ordnance on the

American craft was not heavy enough to inflict any serious damage on the fortifications guarding the harbor. Probably these difficulties were not appreciated by the authorities at Washington; at all events, in the spring of 1803 Morris was suspended from his command and subsequently lost his commission.

In the squadron of which Commodore Preble now took command was the *Philadelphia*, a frigate of thirty-six guns, to which Captain Bainbridge, eager to square accounts with the Corsairs, had been assigned. Late in October Bainbridge sighted a Tripolitan vessel standing in shore. He gave chase at once with perhaps more zeal than discretion, following his quarry well in shore in the hope of disabling her before she could make the harbor. Failing to intercept the corsair, he went about and was heading out to sea when the frigate ran on an uncharted reef and stuck fast. A worse predicament could scarcely be imagined. Every device known to Yankee seamen was employed to free the unlucky vessel. "The sails were promptly laid a-back," Bainbridge reported, "and the forward guns run aft, in hopes of backing her off, which not producing the desired effect, orders were given to stave the water in her hold, and pump it out, throw



overboard the lumber and heavy articles of every kind, cut away the anchors . . . and throw over all the guns, except a few for our defence. . . . As a last resource the foremast and main-topgallant mast were cut away, but without any beneficial effect, and the ship remained a perfect wreck, exposed to the constant fire of the gunboats, which could not be returned."

The officers advised Bainbridge that the situation was becoming intolerable and justified desperate measures. They had been raked by a galling fire for more than four hours; they had tried every means of floating the ship; humiliating as the alternative was, they saw no other course than to strike the colors. All agreed, therefore, that they should flood the magazine, scuttle the ship, and surrender to the Tripolitan small craft which hovered around the doomed frigate like so many vultures.

For the second time off this accursed coast Bainbridge hauled down his colors. The crews of the Tripolitan gunboats swarmed aboard and set about plundering right and left. Swords, epaulets, watches, money, and clothing were stripped from the officers; and if the crew in the forecastle suffered less it was because they had less to lose.

Officers and men were then tumbled into boats and taken ashore, half-naked and humiliated beyond words. Escorted by the exultant rabble, these three hundred luckless Americans were marched to the castle, where the Pasha sat in state. His Highness was in excellent humor. Three hundred Americans! He counted them, each worth hundreds of dollars. Allah was good!

A long, weary bondage awaited the captives. The common seamen were treated like galley-slaves, but the officers were given some consideration through the intercession of the Danish consul. Bainbridge was even allowed to correspond with Commodore Preble, and by means of invisible ink he transmitted many important messages which escaped the watchful eyes of his captors. Depressed by his misfortune—for no one then or afterwards held him responsible for the disaster—Bainbridge had only one thought, and that was revenge. Day and night he brooded over plans of escape and retribution.

As though to make the captive Americans drink the dregs of humiliation, the *Philadelphia* was floated off the reef in a heavy sea and towed safely into the harbor. The scuttling of the vessel had been hastily contrived, and the jubilant Tripolitans

succeeded in stopping her seams before she could fill. A frigate like the *Philadelphia* was a prize the like of which had never been seen in the Pasha's reign. He rubbed his hands in glee and taunted her crew.

The sight of the frigate riding peacefully at anchor in the harbor was torture to poor Bainbridge. In feverish letters he implored Preble to bombard the town, to sink the gunboats in the harbor, to recapture the frigate or to burn her at her moorings — anything to take away the bitterness of humiliation. The latter alternative, indeed, Preble had been revolving in his own mind.

Toward midnight of February 16, 1804, Bainbridge and his companions were aroused by the guns of the fort. They sprang to the window and witnessed the spectacle for which the unhappy captain had prayed long and devoutly. The *Philadelphia* was in flames — red, devouring flames, pouring out of her hold, climbing the rigging, licking her topmasts, forming fantastic columns — devastating, unconquerable flames — the frigate was doomed, doomed! And every now and then one of her guns would explode as though booming out her requiem. Bainbridge was avenged.

How had it all happened?

The inception of this daring feat must be credited to Commodore Preble; the execution fell to young Stephen Decatur, lieutenant in command of the sloop *Enterprise*. The plan was this: to use the *Intrepid*, a captured Tripolitan ketch, as the instrument of destruction, equipping her with combustibles and ammunition, and if possible to burn the *Philadelphia* and other ships in the harbor while raking the Pasha's castle with the frigate's eighteen-pounders. When Decatur mustered his crew on the deck of the *Enterprise* and called for volunteers for this exploit, every man jack stepped forward. Not a man but was spoiling for excitement after months of tedious inactivity; not an American who did not covet a chance to avenge the loss of the *Philadelphia*. But all could not be used, and Decatur finally selected five officers and sixty-two men. On the night of the 3rd of February, the *Intrepid* set sail from Syracuse, accompanied by the brig *Siren*, which was to support the boarding party with her boats and cover their retreat.

Two weeks later, the *Intrepid*, barely distinguishable in the light of a new moon, drifted into the harbor of Tripoli. In the distance lay the unfortunate *Philadelphia*. The little ketch was now within range of the batteries, but she drifted on

unmolested until within a hundred yards of the frigate. Then a hail came across the quiet bay. The pilot replied that he had lost his anchors and asked permission to make fast to the frigate for the night. The Tripolitan lookout grumbled assent. Ropes were then thrown out and the vessels were drawing together, when the cry "Americanas!" went up from the deck of the frigate. In a trice Decatur and his men had scrambled aboard and overpowered the crew.

It was a crucial moment. If Decatur's instructions had not been imperative, he would have thrown prudence to the winds and have tried to cut out the frigate and make off in her. There were those, indeed, who believed that he might have succeeded. But the Commodore's orders were to destroy the frigate. There was no alternative. Combustibles were brought on board, the match applied, and in a few moments the frigate was ablaze. Decatur and his men had barely time to regain the *Intrepid* and to cut her fasts. The whole affair had not taken more than twenty minutes, and no one was killed or even seriously wounded.

Pulling lustily at their sweeps, the crew of the *Intrepid* moved her slowly out of the harbor, in the light of the burning vessel. The guns of the fort

were manned at last and were raining shot and shell wildly over the harbor. The jack-tars on the *Intrepid* seemed oblivious to danger, "commenting upon the beauty of the spray thrown up by the shot between us and the brilliant light of the ship, rather than calculating any danger," wrote Midshipman Morris. Then the starboard guns of the *Philadelphia*, as though instinct with purpose, began to send hot shot into the town. The crew yelled with delight and gave three cheers for the redoubtable old frigate. It was her last action, God bless her! Her cables soon burned, however, and she drifted ashore, there to blow up in one last supreme effort to avenge herself. At the entrance of the harbor the *Intrepid* found the boats of the *Siren*, and three days later both rejoined the squadron.

Thrilling as Decatur's feat was, it brought peace no nearer. The Pasha, infuriated by the loss of the *Philadelphia*, was more exorbitant than ever in his demands. There was nothing for it but to scour the Mediterranean for Tripolitan ships, maintain the blockade so far as weather permitted, and await the opportunity to reduce the city of Tripoli by bombardment. But Tripoli was a hard nut to crack. On the ocean side it was protected

by forts and batteries and the harbor was guarded by a long line of reefs. Through the openings in this natural breakwater, the light-draft native craft could pass in and out to harass the blockading fleet.

It was Commodore Preble's plan to make a carefully concerted attack upon this stronghold as soon as summer weather conditions permitted. For this purpose he had strengthened his squadron at Syracuse by purchasing a number of flat-bottomed gunboats with which he hoped to engage the enemy in the shallow waters about Tripoli while his larger vessels shelled the town and batteries. He arrived off the African coast about the middle of July but encountered adverse weather, so that for several weeks he could accomplish nothing of consequence. Finally, on the 3rd of August, a memorable date in the annals of the American navy, he gave the signal for action.

The new gunboats were deployed in two divisions, one commanded by Decatur, and fully met expectations by capturing two enemy ships in most sanguinary, hand-to-hand fighting. Meantime the main squadron drew close in shore, so close, it is said, that the gunners of shore batteries could not depress their pieces sufficiently to score hits. All these preliminaries were watched with bated



breath by the officers of the old *Philadelphia* from behind their prison bars.

The Pasha had viewed the approach of the American fleet with utter disdain. He promised the spectators who lined the terraces that they would witness some rare sport; they should see his gunboats put the enemy to flight. But as the American gunners began to get the range and pour shot into the town, and the *Constitution* with her heavy ordnance passed and repassed, delivering broadsides within three cables' length of the batteries, the Pasha's nerves were shattered and he fled precipitately to his bomb-proof shelter. No doubt the damage inflicted by this bombardment was very considerable, but Tripoli still defied the enemy. Four times within the next four weeks Preble repeated these assaults, pausing after each bombardment to ascertain what terms the Pasha had to offer; but the wily Yusuf was obdurate, knowing well enough that, if he waited, the gods of wind and storm would come to his aid and disperse the enemy's fleet.

It was after the fifth ineffectual assault that Preble determined on a desperate stroke. He resolved to fit out a fireship and to send her into the very jaws of death, hoping to destroy the Tripolitan



gunboats and at the same time to damage the castle and the town. He chose for this perilous enterprise the old *Intrepid* which had served her captors so well, and out of many volunteers he gave the command to Captain Richard Somers and Lieutenant Henry Wadsworth. The little ketch was loaded with a hundred barrels of gunpowder and a large quantity of combustibles and made ready for a quick run by the batteries into the harbor. Certain death it seemed to sail this engine of destruction past the outlying reefs into the midst of the Tripolitan gunboats; but every precaution was taken to provide for the escape of the crew. Two rowboats were taken along and in these frail craft they believed they could embark, when once the torch had been applied, and in the ensuing confusion return to the squadron.

Somers selected his crew of ten men with care, and at the last moment consented to let Lieutenant Joseph Israel join the perilous expedition. On the night of the 4th of September, the *Intrepid* sailed off in the darkness toward the mouth of the harbor. Anxious eyes followed the little vessel, trying to pierce the blackness that soon enveloped her. As she neared the harbor the shore batteries opened fire; and suddenly a blinding flash and a

terrific explosion told the fate which overtook her. Fragments of wreckage rose high in the air, the fearful concussion was felt by every boat in the squadron, and then darkness and awful silence enfolded the dead and the dying. Two days later the bodies of the heroic thirteen, mangled beyond recognition, were cast up by the sea. Even Captain Bainbridge, gazing sorrowfully upon his dead comrades could not recognize their features. Just what caused the explosion will never be known. Preble always believed that Tripolitans had attempted to board the *Intrepid* and that Somers had deliberately fired the powder magazine rather than surrender. Be that as it may, no one doubts that the crew were prepared to follow their commander to self-destruction if necessary. In deep gloom, the squadron returned to Syracuse, leaving a few vessels to maintain a fitful blockade off the hated and menacing coast.

Far away from the sound of Commodore Preble's guns a strange, almost farcical, intervention in the Tripolitan War was preparing. The scene shifts to the desert on the east, where William Eaton, consul at Tunis, becomes the center of interest. Since the very beginning of the war, this energetic

and enterprising Connecticut Yankee had taken a lively interest in the fortunes of Hamet Karamanli, the legitimate heir to the throne, who had been driven into exile by Yusuf the pretender. Eaton loved intrigue as Preble gloried in war. Why not assist Hamet to recover his throne? Why not, in frontier parlance, start a back-fire that would make Tripoli too hot for Yusuf? He laid his plans before his superiors at Washington, who, while not altogether convinced of his competence to play the king-maker, were persuaded to make him navy agent, subject to the orders of the commander of the American squadron in the Mediterranean. Commodore Samuel Barron, who succeeded Preble, was instructed to avail himself of the coöperation of the ex-Pasha of Tripoli if he deemed it prudent. In the fall of 1804 Barron dispatched Eaton in the *Argus*, Captain Isaac Hull commander, to Alexandria to find Hamet and to assure him of the coöperation of the American squadron in the reconquest of his kingdom. Eaton entered thus upon the coveted rôle: twenty centuries looked down upon him as they had upon Napoleon.

A mere outline of what followed reads like the scenario of an *opera bouffe*. Eaton ransacked Alexandria in search of Hamet the unfortunate but

failed to find the truant. Then acting on a rumor that Hamet had departed up the Nile to join the Mamelukes, who were enjoying one of their seasonal rebellions against constituted authority, Eaton plunged into the desert and finally brought back the astonished and somewhat reluctant heir to the throne. With prodigious energy Eaton then organized an expedition which was to march overland toward Derne, meet the squadron at the Bay of Bomba, and descend *vi et armis* upon the unsuspecting pretender at Tripoli. He even made a covenant with Hamet promising with altogether unwarranted explicitness that the United States would use "their utmost exertions" to reëstablish him in his sovereignty. Eaton was to be "general and commander-in-chief of the land forces." This aggressive Yankee alarmed Hamet, who clearly did not want his sovereignty badly enough to fight for it.

The international army which the American generalissimo mustered was a motley array — twenty-five cannoneers of uncertain nationality, thirty-eight Greeks, Hamet and his ninety followers, and a party of Arabian horsemen and camel-drivers — all told about four hundred men. The story of their march across the desert is a modern *Anabasis*. When the Arabs were not

quarreling among themselves and plundering the rest of the caravan, they were demanding more pay. Rebuffed they would disappear with their camels into the fastnesses of the desert, only to reappear unexpectedly with new importunities. Between Hamet, who was in constant terror of his life and quite ready to abandon the expedition, and these mutinous Arabs, Eaton was in a position to appreciate the vicissitudes of Xenophon and his Ten Thousand. No ordinary person, indeed, could have surmounted all obstacles and brought his balky forces within sight of Derne.

Supported by the American fleet which had rendezvoused as agreed in the Bay of Bomba, the four hundred advanced upon the city. Again the Arab contingent would have made off into the desert but for the promise of more money. Hamet was torn by conflicting emotions, in which a desire to retreat was uppermost. Eaton was, as ever, indefatigable and indomitable. When his forces were faltering at the crucial moment, he boldly ordered an assault and carried the defenses of the city. The guns of the ships in the harbor completed the discomfiture of the enemy, and the international army took possession of the citadel.

Derne won, however, had to be resolutely defended. Twice within the next four weeks, Tripolitan forces were beaten back only with the greatest difficulty. The day after the second assault (June 10th) the frigate *Constellation* arrived off Derne with orders which rang down the curtain on this interlude in the Tripolitan War. Derne was to be evacuated! Peace had been concluded!

Just what considerations moved the Administration to conclude peace at a moment when the largest and most powerful American fleet ever placed under a single command was assembling in the Mediterranean and when the land expedition was approaching its objective, has never been adequately explained. Had the President's belligerent spirit oozed away as the punitive expeditions against Tripoli lost their merely defensive character and took on the proportions of offensive naval operations? Had the Administration become alarmed at the drain upon the treasury? Or did the President wish to have his hands free to deal with those depredations upon American commerce committed by British and French cruisers which were becoming far more frequent and serious than ever the attacks of the Corsairs of the Mediterranean

had been? Certain it is that overtures of peace from the Pasha were welcomed by the very naval commanders who had been most eager to wrest a victory from the Corsairs. Perhaps they, too, were wearied by prolonged war with an elusive foe off a treacherous coast.

How little prepared the Administration was to sustain a prolonged expedition by land against Tripoli to put Hamet on his throne, appears in the instructions which Commodore Barron carried to the Mediterranean. If he could use Eaton and Hamet to make a diversion, well and good; but he was at the same time to assist Colonel Tobias Lear, American Consul-General at Algiers, in negotiating terms of peace, if the Pasha showed a conciliatory spirit. The Secretary of State calculated that the moment had arrived when peace could probably be secured "without any price and pecuniary compensation whatever."

Such expectations proved quite unwarranted. The Pasha was ready for peace, but he still had his price. Poor Bainbridge, writing from captivity, assured Barron that the Pasha would never let his prisoners go without a ransom. Nevertheless, Commodore Barron determined to meet the overtures which the Pasha had made through the Danish



consul at Tripoli. On the 24th of May he put the frigate *Essex* at the disposal of Lear, who crossed to Tripoli and opened direct negotiations.

The treaty which Lear concluded on June 4, 1805, was an inglorious document. It purchased peace, it is true, and the release of some three hundred sad and woe-begone American sailors. But because the Pasha held three hundred prisoners, and the United States only a paltry hundred, the Pasha was to receive sixty thousand dollars. Derne was to be evacuated and no further aid was to be given to rebellious subjects. The United States was to endeavor to persuade Hamet to withdraw from the soil of Tripoli — no very difficult matter — while the Pasha on his part was to restore Hamet's family to him — at some future time. Nothing was said about tribute; but it was understood that according to ancient custom each newly appointed consul should carry to the Pasha a present not exceeding six thousand dollars.

The Tripolitan War did not end in a blaze of glory for the United States. It had been waged in the spirit of "not a cent for tribute"; it was concluded with a thinly veiled payment for peace; and, worst of all, it did not prevent further trouble with the Barbary States. The war had been prosecuted



with vigor under Preble; it had languished under Barron; and it ended just when the naval forces were adequate to the task. Yet, from another point of view, Preble, Decatur, Somers, and their comrades had not fought in vain. They had created imperishable traditions for the American navy; they had established a morale in the service; and they had trained a group of young officers who were to give a good account of themselves when their foes should be not shifty Tripolitans but sturdy Britons.

## CHAPTER IV

### THE SHADOW OF THE FIRST CONSUL

BAINBRIDGE in forlorn captivity at Tripoli, Preble and Barron keeping anxious watch off the stormy coast of Africa, Eaton marching through the wind-swept desert, are picturesque figures that arrest the attention of the historian; but they seemed like shadowy actors in a remote drama to the American at home, absorbed in the humdrum activities of trade and commerce. Through all these dreary years of intermittent war, other matters engrossed the President and Congress and caught the attention of the public. Not the rapacious Pasha of Tripoli but the First Consul of France held the center of the stage. At the same time that news arrived of the encounter of the *Enterprise* with the Corsairs came also the confirmation of rumors current all winter in Europe. Bonaparte had secured from Spain the retrocession of the province of Louisiana. From every point of view, as the

President remarked, the transfer of this vast province to a new master was "an inauspicious circumstance." The shadow of the Corsican, already a menace to the peace of Europe, fell across the seas.

A strange chain of circumstances linked Bonaparte with the New World. When he became master of France by the *coup d'état* of the 18th Brumaire (November 9, 1799), he fell heir to many policies which the republic had inherited from the old régime. Frenchmen had never ceased to lament the loss of colonial possessions in North America. From time to time the hope of reviving the colonial empire sprang up in the hearts of the rulers of France. It was this hope that had inspired Genet's mission to the United States and more than one intrigue among the pioneers of the Mississippi Valley, during Washington's second Administration. The connecting link between the old régime and the new was the statesman Talleyrand. He had gone into exile in America when the French Revolution entered upon its last frantic phase and had brought back to France the plan and purpose which gave consistency to his diplomacy in the office of Minister of Foreign Affairs, first under the Directory, then under the First Consul. Had Talleyrand alone nursed this plan, it would

have had little significance in history; but it was eagerly taken up by a group of Frenchmen who believed that France, having set her house in order and secured peace in Europe, should now strive for orderly commercial development. The road to prosperity, they believed, lay through the acquisition of colonial possessions. The recovery of the province of Louisiana was an integral part of their programme.

While the Directory was still in power and Bonaparte was pursuing his ill-fated expedition in Egypt, Talleyrand had tried to persuade the Spanish Court to cede Louisiana and the Floridas. The only way for Spain to put a limit to the ambitions of the Americans, he had argued speciously, was to shut them up within their natural limits. Only so could Spain preserve the rest of her immense domain. But since Spain was confessedly unequal to the task, why not let France shoulder the responsibility? "The French Republic, mistress of these two provinces, will be a wall of brass forever impenetrable to the combined efforts of England and America," he assured the Spaniards. But the time was not ripe.

Such, then, was the policy which Bonaparte inherited when he became First Consul and master

of the destinies of his adopted country. A dazzling future opened before him. Within a year he had pacified Europe, crushing the armies of Austria by a succession of brilliant victories, and laying prostrate the petty states of the Italian peninsula. Peace with England was also in sight. Six weeks after his victory at Marengo, Bonaparte sent a special courier to Spain to demand — the word is hardly too strong — the retrocession of Louisiana.

It was an odd whim of Fate that left the destiny of half the American continent to Don Carlos IV, whom Henry Adams calls “a kind of Spanish George III” — virtuous, to be sure, but heavy, obtuse, inconsequential, and incompetent. With incredible fatuousness the King gave his consent to a bargain by which he was to yield Louisiana in return for Tuscany or other Italian provinces which Bonaparte had just overrun with his armies. “Congratulate me,” cried Don Carlos to his Prime Minister, his eyes sparkling, “on this brilliant beginning of Bonaparte’s relations with Spain. The Prince-presumptive of Parma, my son-in-law and nephew, a Bourbon, is invited by France to reign, on the delightful banks of the Arno, over a people who once spread their commerce through the known world, and who were the controlling

power of Italy, — a people mild, civilized, full of humanity; the classical land of science and art.” A few war-ridden Italian provinces for an imperial domain that stretched from the Gulf of Mexico to Lake Superior and that extended westward no one knew how far!

The bargain was closed by a preliminary treaty signed at San Ildefonso on October 1, 1800. Just one year later to a day, the preliminaries of the Peace of Amiens were signed, removing the menace of England on the seas. The First Consul was now free to pursue his colonial policy, and the destiny of the Mississippi Valley hung in the balance. Between the First Consul and his goal, however, loomed up the gigantic figure of Toussaint L'Ouverture, a full-blooded negro, who had made himself master of Santo Domingo and had thus planted himself squarely in the sea-road to Louisiana. The story of this “gilded African,” as Bonaparte contemptuously dubbed him, cannot be told in these pages, because it involves no less a theme than the history of the French Revolution in this island, once the most thriving among the colonial possessions of France in the West Indies. The great plantations of French Santo Domingo (the western part of the island) had supplied half of Europe with

sugar, coffee, and cotton; three-fourths of the imports from French-American colonies were shipped from Santo Domingo. As the result of class struggles between whites and mulattoes for political power, the most terrific slave insurrection in the Western Hemisphere had deluged the island in blood. Political convulsions followed which wrecked the prosperity of the island. Out of this chaos emerged the one man who seemed able to restore a semblance of order — the Napoleon of Santo Domingo, whose character, thinks Henry Adams, had a curious resemblance to that of the Corsican. The negro was, however, a ferocious brute without the redeeming qualities of the Corsican, though, as a leader of his race, his intelligence cannot be denied. Though professing allegiance to the French Republic, Toussaint was driven by circumstances toward independence. While his Corsican counterpart was executing his *coup d'état* and pacifying Europe, he threw off the mask, imprisoned the agent of the French Directory, seized the Spanish part of the island, and proclaimed a new constitution for Santo Domingo, assuming all power for himself for life and the right of naming his successor. The negro defied the Corsican.

The First Consul was now prepared to accept the

challenge. Santo Domingo must be recovered and restored to its former prosperity — even if slavery had to be reëstablished — before Louisiana could be made the center of colonial empire in the West. He summoned Leclerc, a general of excellent reputation and husband of his beautiful sister Pauline, and gave to him the command of an immense expedition which was already preparing at Brest. In the latter part of November, Leclerc set sail with a large fleet bearing an army of ten thousand men and on January 29, 1802, arrived off the eastern cape of Santo Domingo. A legend says that Toussaint looking down on the huge armada exclaimed, "We must perish. All France is coming to Santo Domingo. It has been deceived; it comes to take vengeance and enslave the blacks." The negro leader made a formidable resistance, nevertheless, annihilating one French army and seriously endangering the expedition. But he was betrayed by his generals, lured within the French lines, made prisoner, and finally sent to France. He was incarcerated in a French fortress in the Jura Mountains and there perished miserably in 1803.

The significance of these events in the French West Indies was not lost upon President Jefferson. The conquest of Santo Domingo was the prelude to



the occupation of Louisiana. It would be only a change of European proprietors, of absentee landlords, to be sure; but there was a world of difference between France, bent upon acquiring a colonial empire and quiescent Spain, resting on her past achievements. The difference was personified by Bonaparte and Don Carlos. The sovereignty of the lower Mississippi country could never be a matter of indifference to those settlers of Tennessee, Kentucky, and Ohio who in the year 1799 sent down the Mississippi in barges, keel-boats, and flatboats one hundred and twenty thousand pounds of tobacco, ten thousand barrels of flour, twenty-two thousand pounds of hemp, five hundred barrels of cider, and as many more of whiskey, for transshipment and export. The right of navigation of the Mississippi was a diplomatic problem bequeathed by the Confederation. The treaty with Spain in 1795 had not solved the question, though it had established a *modus vivendi*. Spain had conceded to Americans the so-called right of deposit for three years — that is, the right to deposit goods at New Orleans free of duty and to transship them to ocean-going vessels; and the concession, though never definitely renewed, was tacitly continued. No; the people of the

trans-Alleghany country could not remain silent and unprotesting witnesses to the retrocession of Louisiana.

Nor was Jefferson's interest in the Mississippi problem of recent origin. Ten years earlier as Secretary of State, while England and Spain seemed about to come to blows over the Nootka Sound affair, he had approached both France and Spain to see whether the United States might not acquire the island of New Orleans or at least a port near the mouth of the river "with a circum-adjacent territory, sufficient for its support, well-defined, and extraterritorial to Spain." In case of war, England would in all probability conquer Spanish Louisiana. How much better for Spain to cede territory on the eastern side of the Mississippi to a safe neighbor like the United States and thereby make sure of her possessions on the western waters of that river. It was "not our interest," wrote Mr. Jefferson, "to cross the Mississippi for ages!"

It was, then, a revival of an earlier idea when President Jefferson, officially through Robert R. Livingston, Minister to France, and unofficially through a French gentleman, Dupont de Nemours, sought to impress upon the First Consul the unwisdom of his taking possession of Louisiana, without

ceding to the United States at least New Orleans and the Floridas as a "palliation." Even so, France would become an object of suspicion, a neighbor with whom Americans were bound to quarrel.

Undeterred by this naïve threat, doubtless considering its source, the First Consul pressed Don Carlos for the delivery of Louisiana. The King procrastinated but at length gave his promise on condition that France should pledge herself not to alienate the province. Of course, replied the obliging Talleyrand. The King's wishes were identical with the intentions of the French government. France would never alienate Louisiana. The First Consul pledged his word. On October 15, 1802, Don Carlos signed the order that delivered Louisiana to France.

While the President was anxiously awaiting the results of his diplomacy, news came from Santo Domingo that Leclerc and his army had triumphed over Toussaint and his faithless generals, only to succumb to a far more insidious foe. Yellow fever had appeared in the summer of 1802 and had swept away the second army dispatched by Bonaparte to take the place of the first which had been consumed in the conquest of the island. Twenty-four thousand men had been sacrificed at the very

threshold of colonial empire, and the skies of Europe were not so clear as they had been. And then came the news of Leclerc's death (November 2, 1802). Exhausted by incessant worry, he too had succumbed to the pestilence; and with him, as events proved, passed Bonaparte's dream of colonial empire in the New World.

Almost at the same time with these tidings a report reached the settlers of Kentucky and Tennessee that the Spanish intendant at New Orleans had suspended the right of deposit. The Mississippi was therefore closed to western commerce. Here was the hand of the Corsican.<sup>1</sup> Now they knew what they had to expect from France. Why not seize the opportunity and strike before the French legions occupied the country? The Spanish garrisons were weak; a few hundred resolute frontiersmen would speedily overpower them.

Convinced that he must resort to stiffer measures if he would not be hurried into hostilities, President Jefferson appointed James Monroe as Minister Plenipotentiary and Envoy Extraordinary to France and Spain. He was to act with Robert

<sup>1</sup> It is now clear enough that Bonaparte was not directly responsible for this act of the Spanish intendant. See Channing, *History of the United States*, vol. iv, p. 312, and Note, 326-327.

Livingston at Paris and with Charles Pinckney, Minister to Spain, "in enlarging and more effectually securing our rights and interests in the river Mississippi and in the territories eastward thereof" — whatever these vague terms might mean. The President evidently read much into them, for he assured Monroe that on the event of his mission depended the future destinies of the Republic.

Two months passed before Monroe sailed with his instructions. He had ample time to study them, for he was thirty days in reaching the coast of France. The first aim of the envoys was to procure New Orleans and the Floridas, bidding as high as ten million dollars if necessary. Failing in this object, they were then to secure the right of deposit and such other desirable concessions as they could. To secure New Orleans, they might even offer to guarantee the integrity of Spanish possessions on the west bank of the Mississippi. Throughout the instructions ran the assumption that the Floridas had either passed with Louisiana into the hands of France or had since been acquired.

While the packet bearing Monroe was buffetting stormy seas, the policy of Bonaparte underwent a transformation — an abrupt transformation it seemed to Livingston. On the 12th of March

the American Minister witnessed an extraordinary scene in Madame Bonaparte's drawing-room. Bonaparte and Lord Whitworth, the British Ambassador, were in conversation, when the First Consul remarked, "I find, my Lord, your nation want war again." "No, Sir," replied the Ambassador, "we are very desirous of peace." "I must either have Malta or war," snapped Bonaparte. The amazed onlookers soon spread the rumor that Europe was again to be plunged into war; but, viewed in the light of subsequent events, this incident had even greater significance; it marked the end of Bonaparte's colonial scheme. Though the motives for this change of front will always be a matter of conjecture, they are somewhat clarified by the failure of the Santo Domingo expedition. Leclerc was dead; the negroes were again in control; the industries of the island were ruined; Rochambeau, Leclerc's successor, was clamoring for thirty-five thousand more men to reconquer the island; the expense was alarming — and how meager the returns for this colonial venture! Without Santo Domingo, Louisiana would be of little use; and to restore prosperity to the West India island — even granting that its immediate conquest were possible — would demand many years and large

disbursements. The path to glory did not lie in this direction. In Europe, as Henry Adams observes, "war could be made to support war; in Santo Domingo peace alone could but slowly repair some part of this frightful waste."

There may well have been other reasons for Bonaparte's change of front. If he read between the lines of a memoir which Pontalba, a wealthy and well-informed resident of Louisiana, sent to him, he must have realized that this province, too, while it might become an inexhaustible source of wealth for France, might not be easy to hold. There was here, it is true, no Toussaint L'Ouverture to lead the blacks in insurrection; but there was a white menace from the north which was far more serious. These Kentuckians, said Pontalba trenchantly, must be watched, cajoled, and brought constantly under French influence through agents. There were men among them who thought of Louisiana "as the highroad to the conquest of Mexico." Twenty or thirty thousand of these westerners on flatboats could come down the river and sweep everything before them. To be sure, they were an undisciplined horde with slender military equipment — a striking contrast to the French legions; but, added the Frenchman, "a



great deal of skill in shooting, the habit of being in the woods and of enduring fatigue — this is what makes up for every deficiency.”

And if Bonaparte had ever read a remarkable report of the Spanish Governor Carondelet, he must have divined that there was something elemental and irresistible in this down-the-river-pressure of the people of the West. “A carbine and a little maize in a sack are enough for an American to wander about in the forests alone for a whole month. With his carbine, he kills the wild cattle and deer for food and defends himself from the savages. The maize dampened serves him in lieu of bread. . . . The cold does not affright him. When a family tires of one location, it moves to another, and there it settles with the same ease. Thus in about eight years the settlement of Cumberland has been formed, which is now about to be created into a state.”

On Easter Sunday, 1803, Bonaparte revealed his purpose, which had doubtless been slowly maturing, to two of his ministers, one of whom, Barbé Marbois, was attached to the United States through residence, his devotion to republican principles, and marriage to an American wife. The First Consul proposed to cede Louisiana to the United



States: he considered the colony as entirely lost. What did they think of the proposal? Marbois, with an eye to the needs of the Treasury of which he was the head, favored the sale of the province; and next day he was directed to interview Livingston at once. Before he could do so, Talleyrand, perhaps surmising in his crafty way the drift of the First Consul's thoughts, startled Livingston by asking what the United States would give for the whole of Louisiana. Livingston, who was in truth hard of hearing, could not believe his ears. For months he had talked, written, and argued in vain for a bit of territory near the mouth of the Mississippi, and here was an imperial domain tossed into his lap, as it were. Livingston recovered from his surprise sufficiently to name a trifling sum which Talleyrand declared too low. Would Mr. Livingston think it over? He, Talleyrand, really did not speak from authority. The idea had struck him, that was all.

Some days later in a chance conversation with Marbois, Livingston spoke of his extraordinary interview with Talleyrand. Marbois intimated that he was not ignorant of the affair and invited Livingston to a further conversation. Although Monroe had already arrived in Paris and was now

apprised of this sudden turn of affairs, Livingston went alone to the Treasury Office and there in conversation, which was prolonged until midnight, he fenced with Marbois over a fair price for Louisiana. The First Consul, said Marbois, demanded one hundred million francs. Livingston demurred at this huge sum. The United States did not want Louisiana but was willing to give ten million dollars for New Orleans and the Floridas. What would the United States give then? asked Marbois. Livingston replied that he would have to confer with Monroe. Finally Marbois suggested that if they would name sixty million francs (less than \$12,000,000) and assume claims which Americans had against the French Treasury for twenty million more, he would take the offer under advisement. Livingston would not commit himself, again insisting that he must consult Monroe.

So important did this interview seem to Livingston that he returned to his apartment and wrote a long report to Madison without waiting to confer with Monroe. It was three o'clock in the morning when he was done. "We shall do all we can to cheapen the purchase," he wrote, "but my present sentiment is that we shall buy."

History does not record what Monroe said when

his colleague revealed these midnight secrets. But in the prolonged negotiations which followed Monroe, though ill, took his part, and in the end, on April 30, 1803, set his hand to the treaty which ceded Louisiana to the United States on the terms set by Marbois. In two conventions bearing the same date, the commissioners bound the United States to pay directly to France the sum of sixty million francs (\$11,250,000) and to assume debts owed by France to American citizens, estimated at not more than twenty million francs (\$3,750,000). Tradition says that after Marbois, Monroe, and Livingston had signed their names, Livingston remarked: "We have lived long, but this is the noblest work of our lives. . . . From this day the United States take their place among the powers of the first rank."

## CHAPTER V

### IN PURSUIT OF THE FLORIDAS

THE purchase of Louisiana was a diplomatic triumph of the first magnitude. No American negotiators have ever acquired so much for so little; yet, oddly enough, neither Livingston nor Monroe had the slightest notion of the vast extent of the domain which they had purchased. They had bought Louisiana "with the same extent that it is now in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other States," but what its actual boundaries were they did not know. Considerably disturbed that the treaty contained no definition of boundaries, Livingston sought information from the enigmatical Talleyrand. "What are the eastern bounds of Louisiana?" he asked. "I do not know," replied Talleyrand; "you must take it as we received it." "But what did you mean to take?" urged Livingston

somewhat naïvely. "I do not know," was the answer. "Then you mean that we shall construe it in our own way?" "I can give you no direction," said the astute Frenchman. "You have made a noble bargain for yourselves, and I suppose you will make the most of it." And with these vague assurances Livingston had to be satisfied.

The first impressions of Jefferson were not much more definite, for, while he believed that the acquired territory more than doubled the area of the United States, he could only describe it as including all the waters of the Missouri and the Mississippi. He started at once, however, to collect information about Louisiana. He prepared a list of queries which he sent to reputable persons living in or near New Orleans. The task was one in which he delighted: to accumulate and diffuse information — a truly democratic mission — gave him more real pleasure than to reign in the Executive Mansion. His interest in the trans-Mississippi country, indeed, was not of recent birth; he had nursed for years an insatiable curiosity about the source and course of the Missouri; and in this very year he had commissioned his secretary, Meriwether Lewis, to explore the great river and its tributaries, to ascertain if they afforded a

direct and practicable water communication across the continent.

The outcome of the President's questionnaire was a report submitted to Congress in the fall of 1803, which contained much interesting information and some entertaining misinformation. The statistical matter we may put to one side, as contemporary readers doubtless did; certain impressions are worth recording. New Orleans, the first and immediate object of negotiations, contained, it would appear, only a small part of the population of the province, which numbered some twenty or more rural districts. On the river above the city were the plantations of the so-called Upper Coast, inhabited mostly by slaves whose Creole masters lived in town; then, as one journeyed up-stream appeared the first and second German Coasts, where dwelt the descendants of those Germans who had been brought to the province by John Law's Mississippi Bubble, an industrious folk making their livelihood as purveyors to the city. Every Friday night they loaded their small craft with produce and held market next day on the river front at New Orleans, adding another touch to the picturesque groups which frequented the levees. Above the German Coasts were the first and second

Acadian Coasts, populated by the numerous progeny of those unhappy refugees who were expelled from Nova Scotia in 1755. Acadian settlements were scattered also along the backwaters west of the great river: Bayou Lafourche was lined with farms which were already producing cotton; near Bayou Têche and Bayou Vermilion — the Attakapas country — were cattle ranges; and to the north was the richer grazing country known as Opelousas.

Passing beyond the Iberville River, which was indeed no river at all but only an overflow of the Mississippi, the traveler up-stream saw on his right hand "the government of Baton Rouge" with its scattered settlements and mixed population of French, Spanish, and Anglo-Americans; and still farther on, the Spanish parish of West Feliciana, accounted a part of West Florida and described by President Jefferson as the garden of the cotton-growing region. Beyond this point the President's description of Louisiana became less confident, as reliable sources of information failed him. His credulity, however, led him to make one amazing statement, which provoked the ridicule of his political opponents, always ready to pounce upon the slips of this philosopher-president. "One extraordinary fact relative to salt must not be omitted,"

he wrote in all seriousness. "There exists, about one thousand miles up the Missouri, and not far from that river, a salt mountain! The existence of such a mountain might well be questioned, were it not for the testimony of several respectable and enterprising traders who have visited it, and who have exhibited several bushels of the salt to the curiosity of the people of St. Louis, where some of it still remains. A specimen of the salt has been sent to Marietta. This mountain is said to be 180 miles long and 45 in width, composed of solid rock salt, without any trees or even shrubs on it." One Federalist wit insisted that this salt mountain must be Lot's wife; another sent an epigram to the *United States Gazette* which ran as follows:

Herostratus of old, to eternalize his name  
Sat the temple of Diana all in a flame;  
But Jefferson lately of Bonaparte bought,  
To pickle his fame, a mountain of salt.

Jefferson was too much of a philosopher to be disturbed by such gibes; but he did have certain constitutional doubts concerning the treaty. How, as a strict constructionist, was he to defend the purchase of territory outside the limits of the United States, when the Constitution did not specifically



grant such power to the Federal Government? He had fought the good fight of the year 1800 to oust Federalist administrators who by a liberal interpretation were making waste paper of the Constitution. Consistency demanded either that he should abandon the treaty or that he should ask for the powers which had been denied to the Federal Government. He chose the latter course and submitted to his Cabinet and to his followers in Congress a draft of an amendment to the Constitution conferring the desired powers. To his dismay they treated his proposal with indifference, not to say coldness. He pressed his point, redrafted his amendment, and urged its consideration once again. Meantime letters from Livingston and Monroe warned him that delay was hazardous; the First Consul might change his mind, as he was wont to do on slight provocation. Privately Jefferson was deeply chagrined, but he dared not risk the loss of Louisiana. With what grace he could summon, he acquiesced in the advice of his Virginia friends who urged him to let events take their course and to drop the amendment, but he continued to believe that such a course if persisted in would make blank paper of the Constitution. He could only trust, as he said in a letter, "that the

good sense of the country will correct the evil of construction when it shall produce its ill effects."

The debates on the treaty in Congress make interesting reading for those who delight in legal subtleties, for many nice questions of constitutional law were involved. Even granting that territory could be acquired, there was the further question whether the treaty-making power was competent irrespective of the House of Representatives. And what, pray, was meant by incorporating this new province in the Union? Was Louisiana to be admitted into the Union as a State by President and Senate? Or was it to be governed as a dependency? And how could the special privileges given to Spanish and French ships in the port of New Orleans be reconciled with that provision of the Constitution which expressly forbade any preference to be given, by any regulation of commerce or revenue, to the ports of one State over those of another? The exigencies of politics played havoc with consistency, so that Republicans supported the ratification of the treaty with erstwhile Federalist arguments, while Federalists used the old arguments of the Republicans. Yet the Senate advised the ratification by a decisive vote and with surprising promptness; and Congress passed a provisional act authorizing the

President to take over and govern the territory of Louisiana.

The vast province which Napoleon had tossed so carelessly into the lap of the young Western Republic was, strangely enough, not yet formally in his possession. The expeditionary force under General Victor which was to have occupied Louisiana had never left port. M. Pierre Clément Laussat, however, who was to have accompanied the expedition to assume the duties of prefect in the province, had sailed alone in January, 1803, to receive the province from the Spanish authorities. If this lonely Frenchman on mission possessed the imagination of his race, he must have had some emotional thrills as he reflected that he was following the sea trail of La Salle and Iberville through the warm waters of the Gulf of Mexico. He could not have entered the Great River and breasted its yellow current for a hundred miles, without seeing in his mind's eye those phantom figures of French and Spanish adventurers who had voyaged up and down its turbid waters in quest of gold or of distant Cathay. As his vessel dropped anchor opposite the town which Bienville had founded, Laussat must have felt that in some degree he was "heir of

all the ages"; yet he was in fact face to face with conditions which, whatever their historic antecedents, were neither French nor Spanish. On the water front of New Orleans, he counted "forty-five Anglo-American ships to ten French." Subsequent experiences deepened this first impression: it was not Spanish nor French influence which had made this port important but those "three hundred thousand planters who in twenty years have swarmed over the eastern plains of the Mississippi and have cultivated them, and who have no other outlet than this river and no other port than New Orleans."

The outward aspect of the city, however, was certainly not American. From the masthead of his vessel Laussat might have seen over a thousand dwellings of varied architecture: houses of adobe, houses of brick, houses of stucco; some with bright colors, others with the harmonious half tones produced by sun and rain. No American artisans constructed the picturesque balconies, the verandas, and belvederes which suggested the semi-tropical existence that Nature forced upon these city dwellers for more than half the year. No American craftsmen wrought the artistic ironwork of balconies, gateways, and window gratings. Here was an

atmosphere which suggested the Old World rather than the New. The streets which ran at right angles were reminiscent of the old régime: Condé, Conti, Dauphiné, St. Louis, Chartres, Bourbon, Orleans — all these names were to be found within the earthen rampart which formed the defense of the city.

The inhabitants were a strange mixture: Spanish, French, American, black, quadroon, and Creole. No adequate definition has ever been formulated for "Creole," but no one familiar with the type could fail to distinguish this caste from those descended from the first French settlers or from the Acadians. A keen observer like Laussat discerned speedily that the Creole had little place in the commercial life of the city. He was your landed proprietor, who owned some of the choicest parts of the city and its growing suburbs, and whose plantations lined both banks of the Mississippi within easy reach from the city. At the opposite end of the social scale were the quadroons — the demi-monde of this little capital — and the negro slaves. Between these extremes were the French and, in ever-growing numbers, the Americans who plied every trade, while the Spaniards constituted the governing class.

Deliberately, in the course of time, as befitted a Spanish gentleman and officer, the Marquis de Casa Calvo, resplendent with regalia, arrived from Havana to act with Governor Don Juan Manuel de Salcedo in transferring the province. A season of gayety followed in which the Spaniards did their best to conceal any chagrin they may have felt at the relinquishment — happily, it might not be termed the surrender — of Louisiana. And finally on the 30th of November, Governor Salcedo delivered the keys of the city to Laussat, in the hall of the Cabildo, while Marquis de Casa Calvo from the balcony absolved the people in Place d'Armes below from their allegiance to his master, the King of Spain.

For the brief term of twenty days Louisiana was again a province of France. Within that time Laussat bestirred himself to gallicize the colony, so far as forms could do so. He replaced the cabildo or hereditary council by a municipal council; he restored the civil code; he appointed French officers to civil and military posts. And all this he did in the full consciousness that American commissioners were already on their way to receive from him in turn the province which his wayward master had sold. On December 20, 1803, young William

Claiborne, Governor of the Mississippi Territory, and General James Wilkinson, with a few companies of soldiers, entered and received from Laussat the keys of the city and the formal surrender of Lower Louisiana. On the Place d'Armes, promptly at noon, the tricolor was hauled down and the American Stars and Stripes took its place. Louisiana had been transferred for the sixth and last time. But what were the metes and bounds of this province which had been so often bought and sold? What had Laussat been instructed to take and give? What, in short, was Louisiana?

The elation which Livingston and Monroe felt at acquiring unexpectedly a vast territory beyond the Mississippi soon gave way to a disquieting reflection. They had been instructed to offer ten million dollars for New Orleans and the Floridas: they had pledged fifteen millions for Louisiana without the Floridas. And they knew that it was precisely West Florida, with the eastern bank of the Mississippi and the Gulf littoral, that was most ardently desired by their countrymen of the West. But might not Louisiana include West Florida? Had Talleyrand not professed ignorance of the eastern boundary? And had he not intimated that the



Americans would make the most of their bargain? Within a month Livingston had convinced himself that the United States could rightfully claim West Florida to the Perdido River, and he soon won over Monroe to his way of thinking. They then reported to Madison that "on a thorough examination of the subject" they were persuaded that they had purchased West Florida as a part of Louisiana.

By what process of reasoning had Livingston and Monroe reached this satisfying conclusion? Their argument proceeded from carefully chosen premises. France, it was said, had once held Louisiana and the Floridas together as part of her colonial empire in America; in 1763 she had ceded New Orleans and the territory west of the Mississippi to Spain, and at the same time she had transferred the Floridas to Great Britain; in 1783 Great Britain had returned the Floridas to Spain which were then reunited to Louisiana as under French rule. *Ergo*, when Louisiana was *retro*-ceded "with the same extent that it now has in the hands of Spain, and that it had when France possessed it," it must have included West Florida.

That Livingston was able to convince himself by this logic, does not speak well for his candor or intelligence. He was well aware that Bonaparte had



failed to persuade Don Carlos to include the Floridas in the retrocession; he had tried to insert in the treaty an article pledging the First Consul to use his good offices to obtain the Floridas for the United States; and in his midnight dispatch to Madison, with the prospect of acquiring Louisiana before him, he had urged the advisability of exchanging this province for the more desirable Floridas. Livingston therefore could not, and did not, say that Spain intended to cede the Floridas as a part of Louisiana, but that she had inadvertently done so and that Bonaparte might have claimed West Florida, if he had been shrewd enough to see his opportunity. The United States was in no way prevented from pressing this claim because the First Consul had not done so. The fact that France had in 1763 actually dismembered her colonial empire and that Louisiana as ceded to Spain extended only to the Iberville, was given no weight in Livingston's deductions.

Having the will to believe, Jefferson and Madison became converts to Livingston's faith. Madison wrote at once that in view of these developments no proposal to exchange Louisiana for the Floridas should be entertained; the President declared himself satisfied that "our right to the Perdido is

substantial and can be opposed by a quibble on form only"; and John Randolph, duly coached by the Administration, flatly declared in the House of Representatives that "We have not only obtained the command of the mouth of the Mississippi, but of the Mobile, with its widely extended branches; and there is not now a single stream of note rising within the United States and falling into the Gulf of Mexico which is not entirely our own, the Appalachicola excepted." From this moment to the end of his administration, the acquisition of West Florida became a sort of obsession with Jefferson. His pursuit of this phantom claim involved American diplomats in strange adventures and at times deflected the whole course of domestic politics.

The first luckless minister to engage in this baffling quest was James Monroe, who had just been appointed Minister to the Court of St. James. He was instructed to take up the threads of diplomacy at Madrid where they were getting badly tangled in the hands of Charles Pinckney, who was a better politician than a diplomat. "Your inquiries may also be directed," wrote Madison, "to the question whether any, and how much, of what passes for

West Florida be fairly included in the territory ceded to us by France." Before leaving Paris on this mission, Monroe made an effort to secure the good offices of the Emperor, but he found Talleyrand cold and cynical as ever. He was given to understand that it was all a question of money; if the United States were willing to pay the price, the Emperor could doubtless have the negotiations transferred to Paris and put the deal through. A loan of seventy million livres to Spain, which would be passed over at once to France, would probably put the United States into possession of the coveted territory. As an honest man Monroe shrunk from this sort of jobbery; besides, he could hardly offer to buy a territory which his Government asserted it had already bought with Louisiana. With the knowledge that he was defying Napoleon, or at least his ministers, he started for Madrid to play a lone hand in what he must have known was a desperate game.

The conduct of the Administration during the next few months was hardly calculated to smooth Monroe's path. In the following February (1804) President Jefferson put his signature to an act which was designed to give effect to the laws of the United States in the newly acquired territory. The

fourth section of this so-called Mobile Act included explicitly within the revenue district of Mississippi all the navigable waters lying within the United States and emptying into the Gulf east of the Mississippi — an extraordinary provision indeed, since unless the Floridas were a part of the United States there were no rivers within the limits of the United States emptying into the Gulf east of the Mississippi. The eleventh section was even more remarkable since it gave the President authority to erect Mobile Bay and River into a separate revenue district and to designate a port of entry.

This cool appropriation of Spanish territory was too much for the excitable Spanish Minister, Don Carlos Martinez Yrujo, who burst into Madison's office one morning with a copy of the act in his hand and with angry protests on his lips. He had been on excellent terms with Madison and had enjoyed Jefferson's friendship and hospitality at Monticello; but he was the accredited representative of His Catholic Majesty and bound to defend his sovereignty. He fairly overwhelmed the timid Madison with reproaches that could never be forgiven or forgotten; and from this moment he was *persona non grata* in the Department of State.

Madison doubtless took Yrujo's reproaches more

to heart just because he felt himself in a false position. The Administration had allowed the transfer of Louisiana to be made in the full knowledge that Laussat had been instructed to claim Louisiana as far as the Rio Bravo on the west but only as far as the Iberville on the east. Laussat had finally admitted as much confidentially to the American commissioners. Yet the Administration had not protested. And now it was acting on the assumption that it might dispose of the Gulf littoral, the West Florida coast, as it pleased. Madison was bound to admit in his heart of hearts that Yrujo had reason to be angry. A few weeks later the President relieved the tense situation, though at the price of an obvious evasion, by issuing a proclamation which declared all the shores and waters "*lying within the boundaries of the United States*"<sup>1</sup> to be a revenue district with Fort Stoddert as the port of entry. But the mischief had been done and no constructive interpretation of the act by the President could efface the impression first made upon the mind of Yrujo. Congress had meant to appropriate West Florida and the President had suffered the bill to become law.

Nor was Pinckney's conduct at Madrid likely to

<sup>1</sup> The italics are President Jefferson's.

make Monroe's mission easier. Two years before, in 1802, he had negotiated a convention by which Spain agreed to pay indemnity for depredations committed by her cruisers in the late war between France and the United States. This convention had been ratified somewhat tardily by the Senate and now waited on the pleasure of the Spanish Government. Pinckney was instructed to press for the ratification by Spain, which was taken for granted; but he was explicitly warned to leave the matter of the Florida claims to Monroe. When he presented the demands of his Government to Cevallos, the Foreign Minister, he was met in turn with a demand for explanations. What, pray, did his Government mean by this act? To Pinckney's astonishment, he was confronted with a copy of the Mobile Act, which Yrujo had forwarded. The South Carolinian replied, in a tone that was not calculated to soothe ruffled feelings, that he had already been advised that West Florida was included in the Louisiana purchase and had so reported to Cevallos. He urged that the two subjects be kept separate and begged His Excellency to have confidence in the honor and justice of the United States. Delays followed until Cevallos finally declared sharply that the treaty would be ratified only on several

conditions, one of which was that the Mobile Act should be revoked. Pinckney then threw discretion to the winds and announced that he would ask for his passports; but his bluster did not change Spanish policy, and he dared not carry out his threat.

It was under these circumstances that Monroe arrived in Madrid on his difficult mission. He was charged with the delicate task of persuading a Government whose pride had been touched to the quick to ratify the claims convention, to agree to a commission to adjudicate other claims which it had refused to recognize, to yield West Florida as a part of the Louisiana purchase, and to accept two million dollars for the rest of Florida east of the Perdido River. In preparing these extraordinary instructions, the Secretary of State labored under the hallucination that Spain, on the verge of war with England, would pay handsomely for the friendship of the United States, quite forgetting that the real master of Spain was at Paris.

The story of Monroe's five weary months in Spain may be briefly told. He was in the unstrategic position of one who asks for everything and can concede nothing. Only one consideration could probably have forced the Spanish Government to



yield, and that was fear. Spain had now declared war upon England and might reasonably be supposed to prefer a solid accommodation with the United States, as Madison intimated, rather than add to the number of her foes. But Cevallos exhibited no signs of fear; on the contrary he professed an amiable willingness to discuss every point at great length. Every effort on the part of the American to reach a conclusion was adroitly eluded. It was a game in which the Spaniard had no equal. At last, when indubitable assurances came to Monroe from Paris that Napoleon would not suffer Spain to make the slightest concession either in the matter of spoliation claims or any other claims, and that, in the event of a break between the United States and Spain, he would surely take the part of Spain, Monroe abandoned the game and asked for his passports. Late in May he returned to Paris, where he joined with General Armstrong, who had succeeded Livingston, in urging upon the Administration the advisability of seizing Texas, leaving West Florida alone for the present.

Months of vacillation followed the failure of Monroe's mission. The President could not shake off his obsession, and yet he lacked the resolution to employ force to take either Texas, which he did not



want but was entitled to, or West Florida which he ardently desired but whose title was in dispute. It was not until November of the following year (1805) that the Administration determined on a definite policy. In a meeting of the Cabinet "I proposed," Jefferson recorded in a memorandum, "we should address ourselves to France, informing her it was a last effort at amicable settlement with Spain and offer to her, or through her," a sum not to exceed five million dollars for the Floridas. The chief obstacle in the way of this programme was the uncertain mood of Congress, for a vote of credit was necessary and Congress might not take kindly to Napoleon as intermediary. Jefferson then set to work to draft a message which would "alarm the fears of Spain by a vigorous language, in order to induce her to join us in appealing to the interference of the Emperor."

The message sent to Congress alluded briefly to the negotiations with Spain and pointed out the unsatisfactory relations which still obtained. Spain had shown herself unwilling to adjust claims or the boundaries of Louisiana; her depredations on American commerce had been renewed; arbitrary duties and vexatious searches continued to obstruct American shipping on the Mobile; inroads had

been made on American territory; Spanish officers and soldiers had seized the property of American citizens. It was hoped that Spain would view these injuries in their proper light; if not, then the United States "must join in the unprofitable contest of trying which party can do the other the most harm. Some of these injuries may perhaps admit a peaceable remedy. Where that is competent, it is always the most desirable. But some of them are of a nature to be met by force only, and all of them may lead to it."

Coming from the pen of a President who had declared that peace was his passion, these belligerent words caused some bewilderment but, on the whole, very considerable satisfaction in Republican circles, where the possibility of rupture had been freely discussed. The people of the Southwest took the President at his word and looked forward with enthusiasm to a war which would surely overthrow Spanish rule in the Floridas and yield the coveted lands along the Gulf of Mexico. The country awaited with eagerness those further details which the President had promised to set forth in another message. These were felt to be historic moments full of dramatic possibilities.

Three days later, behind closed doors, Congress

listened to the special message which was to put the nation to the supreme test. Alas for those who had expected a trumpet call to battle. Never was a state paper better calculated to wither martial spirit. In dull fashion it recounted the events of Monroe's unlucky mission and announced the advance of Spanish forces in the Southwest, which, however, the President had not repelled, conceiving that "Congress alone is constitutionally invested with the power of changing our condition from peace to war." He had "barely instructed" our forces "to patrol the borders actually delivered to us." It soon dawned upon the dullest intelligence that the President had not the slightest intention to recommend a declaration of war. On the contrary, he was at pains to point out the path to peace. There was reason to believe that France was now disposed to lend her aid in effecting a settlement with Spain, and "not a moment should be lost in availing ourselves of it." "Formal war is not necessary, it is not probable it will follow; but the protection of our citizens, the spirit and honor of our country, require that force should be interposed to a certain degree. It will probably contribute to advance the object of peace."

After the warlike tone of the first message, this

sounded like a retreat. It outraged the feelings of the warparty. It was, to their minds, an anticlimax, a pusillanimous surrender. None was angrier than John Randolph of Virginia, hitherto the leader of the forces of the Administration in the House. He did not hesitate to express his disgust with "this double set of opinions and principles"; and his anger mounted when he learned that as Chairman of the Committee on Ways and Means he was expected to propose and carry through an appropriation of two million dollars for the purchase of Florida. Further interviews with the President and the Secretary of State did not mollify him, for, according to his version of these conversations, he was informed that France would not permit Spain to adjust her differences with the United States, which had, therefore, the alternative of paying France handsomely or of facing a war with both France and Spain. Then Randolph broke loose from all restraint and swore by all his gods that he would not assume responsibility for "delivering the public purse to the first cut-throat that demanded it."

Randolph's opposition to the Florida programme was more than an unpleasant episode in Jefferson's administration; it proved to be the beginning of a

revolt which was fatal to the President's diplomacy, for Randolph passed rapidly from passive to active opposition and fought the two-million dollar bill to the bitter end. When the House finally outvoted him and his faction, soon to be known as the "Quids," and the Senate had concurred, precious weeks had been lost. Yet Madison must bear some share of blame for the delay since, for some reason, never adequately explained, he did not send instructions to Armstrong until four weeks after the action of Congress. It was then too late to bait the master of Europe. Just what had happened Armstrong could not ascertain; but when Napoleon set out in October, 1806, on that fateful campaign which crushed Prussia at Jena and Auerstädt, the chance of acquiring Florida had passed.

## CHAPTER VI

### AN AMERICAN CATILINE

WITH the transfer of Louisiana, the United States entered upon its first experience in governing an alien civilized people. At first view there is something incongruous in the attempt of the young Republic, founded upon the consent of the governed, to rule over a people whose land had been annexed without their consent and whose preferences in the matter of government had never been consulted. The incongruity appears the more striking when it is recalled that the author of the Declaration of Independence was now charged with the duty of appointing all officers, civil and military, in the new territory. King George III had never ruled more autocratically over any of his North American colonies than President Jefferson over Louisiana through Governor William Claiborne and General James Wilkinson.

The leaders among the Creoles and better class

of Americans counted on a speedy escape from this autocratic government, which was confessedly temporary. The terms of the treaty, indeed, encouraged the hope that Louisiana would be admitted at once as a State. The inhabitants of the ceded territory were to be "incorporated into the Union." But Congress gave a different interpretation to these words and dashed all hopes by the act of 1804, which, while it conceded a legislative council, made its members and all officers appointive, and divided the province. A delegation of Creoles went to Washington to protest against this inconsiderate treatment. They bore a petition which contained many stiletto-like thrusts at the President. What about those elemental rights of representation and election which had figured in the glorious contest for freedom? "Do political axioms on the Atlantic become problems when transferred to the shores of the Mississippi?" To such arguments Congress could not remain wholly indifferent. The outcome was a third act (March 2, 1805) which established the usual form of territorial government, an elective legislature, a delegate in Congress, and a Governor appointed by the President. To a people who had counted on statehood these concessions were small pinchbeck. Their irritation was not allayed,

and it continued to focus upon Governor Claiborne, the distrusted agent of a government which they neither liked nor respected.

Strange currents and counter-currents ran through the life of this distant province. Casa Calvo and Morales, the former Spanish officials, continued to reside in the city, like spiders at the center of a web of Spanish intrigue; and the threads of their web extended to West Florida, where Governor Folch watched every movement of Americans up and down the Mississippi, and to Texas, where Salcedo, Captain-General of the Internal Provinces of Mexico, waited for overt aggressions from land-hungry American frontiersmen. All these Spanish agents knew that Monroe had left Madrid empty-handed yet still asserting claims that were ill-disguised threats; but none of them knew whether the impending blow would fall upon West Florida or Texas. Then, too, right under their eyes was the Mexican Association, formed for the avowed purpose of collecting information about Mexico which would be useful if the United States should become involved in war with Spain. In the city, also, were adventurous individuals ready for any daring move upon Mexico, where, according to credible reports, a revolution was imminent. The conquest of



Mexico was the day-dream of many an adventurer. In his memoir advising Bonaparte to take and hold Louisiana as an impenetrable barrier to Mexico, Pontalba had said with strong conviction: "It is the surest means of destroying forever the bold schemes with which several individuals in the United States never cease filling the newspapers, by designating Louisiana as the highroad to the conquest of Mexico."

Into this web of intrigue walked the late Vice-President of the United States, leisurely journeying through the Southwest in the summer of 1805.

Aaron Burr is one of the enigmas of American politics. Something of the mystery and romance that shroud the evil-doings of certain Italian despots of the age of the Renaissance envelops him. Despite the researches of historians, the tangled web of Burr's conspiracy has never been unraveled. It remains the most fascinating though, perhaps, the least important episode in Jefferson's administration. Yet Burr himself repays study, for his activities touch many sides of contemporary society and illuminate many dark corners in American politics.

According to the principles of eugenics, Burr was

well-born, and by all the laws of this pseudo-science should have left an honorable name behind him. His father was a Presbyterian clergyman, sound in the faith, who presided over the infancy of the College of New Jersey; his maternal grandfather was that massive divine, Jonathan Edwards. After graduating at Princeton, Burr began to study law but threw aside his law books on hearing the news of Lexington. He served with distinction under Arnold before Quebec, under Washington in the battle of Long Island, and later at Monmouth, and retired with the rank of lieutenant colonel in 1779. Before the close of the Revolution he had begun the practice of law in New York, and had married the widow of a British army officer; entering politics, he became in turn a member of the State Assembly, Attorney-General, and United States Senator. But a mere enumeration of such details does not tell the story of Burr's life and character. Interwoven with the strands of his public career is a bewildering succession of intrigues and adventures in which women have a conspicuous part, for Burr was a fascinating man and disarmed distrust by avoiding any false assumption of virtue. His marriage, however, proved happy. He adored his

wife and fairly worshiped his strikingly beautiful daughter Theodosia.

Burr thrived in the atmosphere of intrigue. New York politics afforded his proper *milieu*. How he ingratiated himself with politicians of high and low degree; how he unlocked the doors to political preferment; how he became one of the first bosses of the city of New York; how he combined public service with private interest; how he organized the voters — no documents disclose. Only now and then the enveloping fog lifts, as, for example, during the memorable election of 1800, when the ignorant voters of the seventh ward, duly drilled and marshaled, carried the city for the Republicans, and not even Colonel Hamilton, riding on his white horse from precinct to precinct, could stay the rout. That election carried New York for Jefferson and made Burr the logical candidate of the party for Vice-President.

These political strokes betoken a brilliant if not always a steady and reliable mind. Burr, it must be said, was not trusted even by his political associates. It is significant that Washington, a keen judge of men, refused to appoint Burr as Minister to France to succeed Morris because he was not convinced of his integrity. And Jefferson

shared these misgivings, though the exigencies of politics made him dissemble his feelings. It is significant, also, that Burr was always surrounded by men of more than doubtful intentions — place-hunters and self-seeking politicians, who had the gambler's instinct.

As Vice-President, Burr could not hope to exert much influence upon the Administration, since the office in itself conferred little power and did not even, according to custom, make him a member of the Cabinet; but as Republican boss of New York who had done more than any one man to secure the election of the ticket in 1800, he might reasonably expect Jefferson and his Virginia associates to treat him with consideration in the distribution of patronage. To his intense chagrin, he was ignored; not only ignored but discredited, for Jefferson deliberately allied himself with the Clintons and the Livingstons, the rival factions in New York which were bent upon driving Burr from the party. This treatment filled Burr's heart with malice; but he nursed his wounds in secret and bided his time.

Realizing that he was politically bankrupt, Burr made a hazard of new fortunes in 1804 by offering himself as candidate for Governor of New York, an office then held by George Clinton. Early in the

year he had a remarkable interview with Jefferson in which he observed that it was for the interest of the party for him to retire, but that his retirement under existing circumstances would be thought discreditable. He asked "some mark of favor from me," Jefferson wrote in his journal, "which would declare to the world that he retired with my confidence" — an executive appointment, in short. This was tantamount to an offer of peace or war. Jefferson declined to gratify him, and Burr then began an intrigue with the Federalist leaders of New England.

The rise of a Republican party of challenging strength in New England cast Federalist leaders into the deepest gloom. Already troubled by the annexation of Louisiana, which seemed to them to imperil the ascendancy of New England in the Union, they now saw their own ascendancy in New England imperiled. Under the depression of impending disaster, men like Senator Timothy Pickering of Massachusetts and Roger Griswold of Connecticut broached to their New England friends the possibility of a withdrawal from the Union and the formation of a Northern Confederacy. As the confederacy shaped itself in Pickering's imagination, it would of necessity include New

York; and the chaotic conditions in New York politics at this time invited intrigue. When, therefore, a group of Burr's friends in the Legislature named him as their candidate for Governor, Pickering and Griswold seized the moment to approach him with their treasonable plans. They gave him to understand that as Governor of New York he would naturally hold a strategic position and could, if he would, take the lead in the secession of the Northern States. Federalist support could be given to him in the approaching election. They would be glad to know his views. But the shifty Burr would not commit himself further than to promise a satisfactory administration. Though the Federalist intriguers would have been glad of more explicit assurances they counted on his vengeful temper and hatred of the Virginia domination at Washington to make him a pliable tool. They were willing to commit the party openly to Burr and trust to events to bind him to their cause.

Against this mad intrigue one clear-headed individual resolutely set himself — not wholly from disinterested motives. Alexander Hamilton had good reason to know Burr. He declared in private conversation, and the remark speedily became public property, that he looked upon Burr as ■

dangerous man who ought not to be trusted with the reins of government. He pleaded with New York Federalists not to commit the fatal blunder of endorsing Burr in caucus, and he finally won his point; but he could not prevent his partisans from supporting Burr at the polls.

The defeat of Burr dashed the hopes of the Federalists of New England; the bubble of a Northern Confederacy vanished. It dashed also Burr's personal ambitions: he could no longer hope for political rehabilitation in New York. And the man who a second time had crossed his path and thwarted his purposes was his old rival, Alexander Hamilton. It is said that Burr was not naturally vindictive: perhaps no man is naturally vindictive. Certain it is that bitter disappointment had now made Burr what Hamilton had called him — "a dangerous man." He took the common course of men of honor at this time; he demanded prompt and unqualified acknowledgment or denial of the expression. Well aware of what lay behind this demand, Hamilton replied deliberately with half-conciliatory words, but he ended with the usual words of those prepared to accept a challenge, "I can only regret the circumstance, and must abide the consequences." A challenge followed. We are told



that Hamilton accepted to save his political leadership and influence — strange illusion in one so gifted! Yet public opinion had not yet condemned dueling, and men must be judged against the background of their times.

On a summer morning (July 11, 1804) Burr and Hamilton crossed the Hudson to Weehawken and there faced each other for the last time. Hamilton withheld his fire; Burr aimed with murderous intent, and Hamilton fell mortally wounded. The shot from Burr's pistol long reverberated. It woke public conscience to the horror and uselessness of dueling, and left Burr an outlaw from respectable society, stunned by the recoil, and under indictment for murder. Only in the South and West did men treat the incident lightly as an affair of honor.

The political career of Burr was now closed. When he again met the Senate face to face, he had been dropped by his own party in favor of George Clinton, to whom he surrendered the Vice-Presidency on March 5, 1805. His farewell address is described as one of the most affecting ever spoken in the Senate. Describing the scene to his daughter, Burr said that tears flowed abundantly, but Burr must have described what he wished to see. American politicians are not Homeric heroes, who weep



on slight provocation; and any inclination to pity Burr must have been inhibited by the knowledge that he had made himself the rallying-point of every dubious intrigue at the capital.

The list of Burr's intimates included Jonathan Dayton, whose term as Senator had just ended, and who, like Burr, sought means of promoting his fortunes, John Smith, Senator from Ohio, the notorious Swartwouts of New York who were attached to Burr as gangsters to their chief, and General James Wilkinson, governor of the northern territory carved out of Louisiana and commander of the western army with headquarters at St. Louis.

Wilkinson had a long record of duplicity, which was suspected but never proved by his contemporaries. There was hardly a dubious episode from the Revolution to this date with which he had not been connected. He was implicated in the Conway cabal against Washington; he was active in the separatist movement in Kentucky during the Confederation; he entered into an irregular commercial agreement with the Spanish authorities at New Orleans; he was suspected — and rightly, as documents recently unearthed in Spain prove — of having taken an oath of allegiance to Spain and of being in the pay of Spain; he was also suspected —

and justly — of using his influence to bring about a separation of the Western States from the Union; yet in 1791 he was given a lieutenant-colonel's commission in the regular army and served under St. Clair in the Northwest, and again as a brigadier-general under Wayne. Even here the atmosphere of intrigue enveloped him, and he was accused of inciting discontent among the Kentucky troops and of trying to supplant Wayne. When commissioners were trying to run the Southern boundary in accordance with the treaty of 1795 with Spain, Wilkinson — still a pensioner of Spain, as documents prove — attempted to delay the survey. In the light of these revelations, Wilkinson appears as an unscrupulous adventurer whose thirst for lucre made him willing to betray either master — the Spaniard who pensioned him or the American who gave him his command.

In the spring of 1805 Burr made a leisurely journey across the mountains, by way of Pittsburgh, to New Orleans, where he had friends and personal followers. The secretary of the territory was one of his henchmen; a justice of the superior court was his stepson; the Creole petitionists who had come to Washington to secure self-government had been cordially received by Burr and had a lively sense of

gratitude. On his way down the Ohio, Burr landed at Blennerhassett's Island, where an eccentric Irishman of that name owned an estate. Harman Blennerhassett was to rue the day that he entertained this fascinating guest. At Cincinnati he was the guest of Senator Smith, and there he also met Dayton. At Nashville he visited General Andrew Jackson, who was thrilled with the prospect of war with Spain; at Fort Massac he spent four days in close conference with General Wilkinson; and at New Orleans he consorted with Daniel Clark, a rich merchant and the most uncompromising opponent of Governor Claiborne, and with members of the Mexican Association and every would-be adventurer and filibuster. In November, Burr was again in Washington. What was the purpose of this journey and what did it accomplish?

It is far easier to tell what Burr did after this mysterious western expedition than what he planned to do. There is danger of reading too great consistency into his designs. At one moment, if we may believe Anthony Merry, the British Minister, who lent an ear to Burr's proposals, he was plotting a revolution which should separate the Western States from the Union. To accomplish this design he needed British funds and a British

naval force. Jonathan Dayton revealed to Yrujo much the same plot — which he thought was worth thirty or forty thousand dollars to the Spanish Government. To such urgent necessity for funds were the conspirators driven. But Dayton added further details to the story which may have been intended only to intimidate Yrujo. The revolution effected by British aid, said Dayton gravely, an expedition would be undertaken against Mexico. Subsequently Dayton unfolded a still more remarkable tale. Burr had been disappointed in the expectation of British aid, and he was now bent upon “an almost insane plan,” which was nothing less than the seizure of the Government at Washington. With the government funds thus obtained, and with the necessary frigates, the conspirators would sail for New Orleans and proclaim the independence of Louisiana and the Western States.

The kernel of truth in these accounts is not easily separated from the chaff. The supposition that Burr seriously contemplated a separation of the Western States from the Union may be dismissed from consideration. The loyalty of the Mississippi Valley at this time is beyond question; and Burr was too keen an observer not to recognize the

temper of the people with whom he sojourned. But there is reason to believe that he and his confederates may have planned an enterprise against Mexico, for such a project was quite to the taste of Westerners who hated Spain as ardently as they loved the Union. Circumstances favored a filibustering expedition. The President's bellicose message of December had prepared the people of the Mississippi Valley for war; the Spanish plotters had been expelled from Louisiana; Spanish forces had crossed the Sabine; American troops had been sent to repel them if need be; the South American revolutionist Miranda had sailed, with vessels fitted out in New York, to start a revolt against Spanish rule in Caracas; every revolutionist in New Orleans was on the *qui vive*. What better time could there be to launch a filibustering expedition against Mexico? If it succeeded and a republic were established, the American Government might be expected to recognize a *fait accompli*.

The success of Burr's plans, whatever they may have been, depended on his procuring funds; and it was doubtless the hope of extracting aid from Blennerhassett that drew him to the island in midsummer of 1806. Burr was accompanied by

his daughter Theodosia and her husband, Joseph Alston, a wealthy South Carolina planter, who was either the dupe or the accomplice of Burr. Together they persuaded the credulous Irishman to purchase a tract of land on the Washita River in the heart of Louisiana, which would ultimately net him a profit of a million dollars when Louisiana became an independent state with Burr as ruler and England as protector. They even assured Blennerhassett that he should go as minister to England. He was so dazzled at the prospect that he not only made the initial payment for the lands, but advanced all his property for Burr's use on receiving a guaranty from Alston. Having landed his fish, Burr set off down the river to visit General Jackson at Nashville and to procure boats and supplies for his expedition.

Meanwhile, Theodosia — the brilliant, fascinating Theodosia — and her husband played the game at Blennerhassett's Island. Blennerhassett's head was completely turned. He babbled most indiscreetly about the approaching *coup d'état*. Colonel Burr would be king of Mexico, he told his gardener, and Mrs. Alston would be queen when Colonel Burr died. Who could resist the charms of this young princess? Blennerhassett and his wife were

impatient to exchange their little isle for marble halls in far away Mexico.

But all was not going well with the future Emperor of Mexico. Ugly rumors were afloat. The active preparations at Blennerhassett's Island, the building of boats at various points along the river, the enlistment of recruits, coupled with hints of secession, disturbed such loyal citizens as the District-Attorney at Frankfort, Kentucky. He took it upon himself to warn the President, and then, in open court, charged Burr with violating the laws of the United States by setting on foot a military expedition against Mexico and with inciting citizens to rebellion in the Western States. But at the meeting of the grand jury Burr appeared surrounded by his friends and with young Henry Clay for counsel. The grand jury refused to indict him and he left the court in triumph. Some weeks later the District-Attorney renewed his motion; but again Burr was discharged by the grand jury, amid popular applause. Enthusiastic admirers in Frankfort even gave a ball in his honor.

Notwithstanding these warnings of conspiracy, President Jefferson exhibited a singular indifference and composure. To all alarmists he made the



same reply. The people of the West were loyal and could be trusted. It was not until disquieting and ambiguous messages from Wilkinson reached Washington — disquieting because ambiguous — that the President was persuaded to act. On the 27th of November, he issued a proclamation warning all good citizens that sundry persons were conspiring against Spain and enjoining all Federal officers to apprehend those engaged in the unlawful enterprise. The appearance of this proclamation at Nashville should have led to Burr's arrest, for he was still detained there; but mysterious influences seemed to paralyze the arm of the Government. On the 22d of December, Burr set off, with two boats which Jackson had built and some supplies, down the Cumberland. At the mouth of the river, he joined forces with Blennerhassett, who had left his island in haste just as the Ohio militia was about to descend upon him. The combined strength of the flotilla was nine bateaux carrying less than sixty men. There was still time to intercept the expedition at Fort Massac, but again delays that have never been explained prevented the President's proclamation from arriving in time; and Burr's little fleet floated peacefully by down stream.



The scene now shifts to the lower Mississippi, and the heavy villain of the melodrama appears on the stage in the uniform of a United States military officer — General James Wilkinson. He had been under orders since May 6, 1806, to repair to the Territory of Orleans with as little delay as possible and to repel any invasion east of the River Sabine; but it was now September and he had only just reached Natchitoches, where the American volunteers and militiamen from Louisiana and Mississippi were concentrating. Much water had flowed under the bridge since Aaron Burr visited New Orleans.

After President Jefferson's bellicose message of the previous December, war with Spain seemed inevitable. And when Spanish troops crossed the Sabine in July and took up their post only seventeen miles from Natchitoches, Western Americans awaited only the word to begin hostilities. The *Orleans Gazette* declared that the time to repel Spanish aggression had come. The enemy must be driven beyond the Sabine. "The route from Natchitoches to Mexico is clear, plain, and open." The occasion was at hand "for conferring on our oppressed Spanish brethren in Mexico those inestimable blessings of freedom which we ourselves

enjoy." "Gallant Louisianians! Now is the time to distinguish yourselves. . . . Should the generous efforts of our Government to establish a free, independent Republican Empire in Mexico be successful, how fortunate, how enviable would be the situation in New Orleans!" The editor who sounded this clarion call was a coadjutor of Burr. On the flood tide of a popular war against Spain, they proposed to float their own expedition. Much depended on General Wilkinson; but he had already written privately of subverting the Spanish Government in Mexico, and carrying "our conquests to California and the Isthmus of Darien."

With much swagger and braggadocio, Wilkinson advanced to the center of the stage. He would drive the Spaniards over the Sabine, though they outnumbered him three to one. "I believe, my friend," he wrote, "I shall be obliged to fight and to flog them." Magnificent stage thunder. But to Wilkinson's chagrin the Spaniards withdrew of their own accord. Not a Spaniard remained to contest his advance to the border. Yet, oddly enough, he remained idle in camp. Why?

Some two weeks later, an emissary appeared at Natchitoches with a letter from Burr dated the 29th of July, in cipher. What this letter may have

originally contained will probably never be known, for only Wilkinson's version survives, and that underwent frequent revision.<sup>1</sup> It is quite as remarkable for its omissions as for anything that it contains. In it there is no mention of a western uprising nor of a revolution in New Orleans; but only the intimation that an attack is to be made upon Spanish possessions, presumably Mexico, with possibly Baton Rouge as the immediate objective. Whether or no this letter changed Wilkinson's plan, we can only conjecture. Certain it is, however, that about this time Wilkinson determined to denounce Burr and his associates and to play a double game, posing on the one hand as the savior of his country and on the other as a secret friend to Spain. After some hesitation he wrote to President Jefferson warning him in general terms of an expedition preparing against Vera Cruz but omitting all mention of Burr. Subsequently he wrote a confidential letter about this "deep, dark, and widespread conspiracy" which enmeshed all classes and conditions in New Orleans and might bring seven thousand men from the Ohio. The contents of

<sup>1</sup> What is usually accepted as the correct version is printed by McCaleb in his *Aaron Burr Conspiracy*, pp. 74 and 75, and by Henry Adams in his *History of the United States*, vol. III, pp 253-4.

Burr's mysterious letter were to be communicated orally to the President by the messenger who bore this precious warning. It was on the strength of these communications that the President issued his proclamation of the 27th of November.

While Wilkinson was inditing these misleading missives to the President, he was preparing the way for his entry at New Orleans. To the perplexed and alarmed Governor he wrote: "You are surrounded by dangers of which you dream not, and the destruction of the American Government is seriously menaced. The storm will probably burst in New Orleans, where I shall meet it, and triumph or perish!" Just five days later he wrote a letter to the Viceroy of Mexico which proves him beyond doubt the most contemptible rascal who ever wore an American uniform. "A storm, a revolutionary tempest, an infernal plot threatens the destruction of the empire," he wrote; the first object of attack would be New Orleans, then Vera Cruz, then Mexico City; scenes of violence and pillage would follow; let His Excellency be on his guard. To ward off these calamities, "I will hurl myself like a Leonidas into the breach." But let His Excellency remember what risks the writer of this letter incurs, "by offering without orders this communication to a

foreign power," and let him reimburse the bearer of this letter to the amount of 121,000 pesos which will be spent to shatter the plans of these bandits from the Ohio.

The arrival of Wilkinson in New Orleans was awaited by friends and foes, with bated breath. The conspirators had as yet no intimation of his intentions: Governor Claiborne was torn by suspicion of this would-be savior, for at the very time he was reading Wilkinson's gasconade he received a cryptic letter from Andrew Jackson which ran, "keep a watchful eye on our General and beware of an attack as well from your own country as Spain!" If Claiborne could not trust "our General," whom could he trust!

The stage was now set for the last act in the drama. Wilkinson arrived in the city, deliberately set Claiborne aside, and established a species of martial law, not without opposition. To justify his course Wilkinson swore to an affidavit based on Burr's letter of the 29th of July and proceeded with his arbitrary arrests. One by one Burr's confederates were taken into custody. The city was kept in a state of alarm; Burr's armed thousands were said to be on the way; the negroes were to be incited to revolt. Only the actual appearance of Burr's

expedition or some extraordinary happening could maintain this high pitch of popular excitement and save Wilkinson from becoming the ridiculous victim of his own folly.

On the 10th of January (1807), after an uneventful voyage down the Mississippi, Burr's flotilla reached the mouth of Bayou Pierre, some thirty miles above Natchez. Here at length was the huge armada which was to shatter the Union — nine boats and sixty men! Tension began to give way. People began to recover their sense of humor. Wilkinson was never in greater danger in his life, for he was about to appear ridiculous. It was at Bayou Pierre that Burr going ashore learned that Wilkinson had betrayed him. His first instinct was to flee, for if he should proceed to New Orleans he would fall into Wilkinson's hands and doubtless be court-martialed and shot; but if he tarried, he would be arrested and sent to Washington. Indecision and despair seized him; and while Blennerhassett and other devoted followers waited for their emperor to declare his intention, he found himself facing the acting-governor of the Mississippi Territory with a warrant for his arrest. To the chagrin of his fellow conspirators, Burr surrendered tamely, even pusillanimously.

The end of the drama was near at hand. Burr was brought before a grand jury, and though he once more escaped indictment, he was put under bonds, quite illegally he thought, to appear when summoned. On the 1st of February he abandoned his followers to the tender mercies of the law and fled in disguise into the wilderness. A month later he was arrested near the Spanish border above Mobile by Lieutenant Gaines, in command at Fort Stoddert, and taken to Richmond. The trial that followed did not prove Burr's guilt, but it did prove Thomas Jefferson's credulity and cast grave doubts on James Wilkinson's loyalty.<sup>1</sup> Burr was acquitted of the charge of treason in court, but he remained under popular indictment, and his memory has never been wholly cleared of the suspicion of treason.

<sup>1</sup> An account of the trial of Burr will be found in *John Marshall and the Constitution* by Edward S. Corwin, in *The Chronicles of America*.

## CHAPTER VII

### AN ABUSE OF HOSPITALITY

WHILE Captain Bainbridge was eating his heart out in the Pasha's prison at Tripoli, his thoughts reverting constantly to his lost frigate, he reminded Commodore Preble, with whom he was allowed to correspond, that "the greater part of our crew consists of English subjects not naturalized in America." This incidental remark comes with all the force of a revelation to those who have fondly imagined that the sturdy jack-tars who manned the first frigates were genuine American sea-dogs. Still more disconcerting is the information contained in a letter from the Secretary of the Treasury to President Jefferson, some years later, to the effect that after 1803 American tonnage increased at the rate of seventy thousand a year, but that of the four thousand seamen required to man this growing mercantile marine, fully one-half were British subjects, presumably deserters. How are



these uncomfortable facts to be explained? Let a third piece of information be added. In a report of Admiral Nelson, dated 1803, in which he broaches a plan for manning the British navy, it is soberly stated that forty-two thousand British seamen deserted "in the late war." Whenever a large convoy assembled at Portsmouth, added the Admiral, not less than a thousand seamen usually deserted from the navy.

The slightest acquaintance with the British navy when Nelson was winning immortal glory by his victory at Trafalgar must convince the most sceptical that his seamen for the most part were little better than galley slaves. Life on board these frigates was well-nigh unbearable. The average life of a seaman, Nelson reckoned, was forty-five years. In this age before processes of refrigeration had been invented, food could not be kept edible on long voyages, even in merchantmen. Still worse was the fare on men-of-war. The health of a crew was left to Providence. Little or no forethought was exercised to prevent disease; the commonest matters of personal hygiene were neglected; and when disease came the remedies applied were scarcely to be preferred to the disease. Discipline, always brutal, was symbolized by the cat-o'-nine-tails. Small

wonder that the navy was avoided like the plague by every man and seaman.

Yet a navy had to be maintained: it was the cornerstone of the Empire. And in all the history of that Empire the need of a navy was never stronger than in these opening years of the nineteenth century. The practice of impressing able men for the royal navy was as old as the reign of Elizabeth. The press gang was an odious institution of long standing — a terror not only to rogue and vagabond but to every able-bodied seafaring man and waterman on rivers, who was not exempted by some special act. It ransacked the prisons, and carried to the navy not only its victims but the germs of fever which infested public places of detention. But the press gang harvested its greatest crop of seamen on the seas. Merchantmen were stopped at sea, robbed of their able sailors, and left to limp short-handed into port. A British East Indiaman homeward bound in 1802 was stripped of so many of her crew in the Bay of Biscay that she was unable to offer resistance to a French privateer and fell a rich victim into the hands of the enemy. The necessity of the royal navy knew no law and often defeated its own purpose.

Death or desertion offered the only way of escape

to the victim of the press gang. And the commander of a British frigate dreaded making port almost as much as an epidemic of typhus. The deserter always found American merchantmen ready to harbor him. Fair wages, relatively comfortable quarters, and decent treatment made him quite ready to take any measures to forswear his allegiance to Britannia. Naturalization papers were easily procured by a few months' residence in any State of the Union; and in default of legitimate papers, certificates of citizenship could be bought for a song in any American seaport, where shysters drove a thrifty traffic in bogus documents. Provided the English navy took the precaution to have the description in his certificate tally with his personal appearance, and did not let his tongue betray him, he was reasonably safe from capture.

Facing the palpable fact that British seamen were deserting just when they were most needed and were making American merchantmen and frigates their asylum, the British naval commanders, with no very nice regard for legal distinctions, extended their search for deserters to the decks of American vessels, whether in British waters or on the high seas. If in time of war, they reasoned, they could stop a neutral ship on the high seas,

search her for contraband of war, and condemn ship and cargo in a prize court if carrying contraband, why might they not by the same token search a vessel for British deserters and impress them into service again? Two considerations seem to justify this reasoning: the trickiness of the smart Yankees who forged citizenship papers, and the indelible character of British allegiance. Once an Englishman always an Englishman, by Jove! Your hound of a sea-dog might try to talk through his nose like a Yankee, you know, and he might shove a dirty bit of paper at you, but he couldn't shake off his British citizenship if he wanted to! This was good English law, and if it wasn't recognized by other nations so much the worse for them. As one of these redoubtable British captains put it, years later: "‘Might makes right’ is the guiding, practical maxim among nations and ever will be, so long as powder and shot exist, with money to back them, and energy to wield them." Of course, there were hair-splitting fellows, plenty of them, in England and the States, who told you that it was one thing to seize a vessel carrying contraband and have her condemned by judicial process in a court of admiralty, and quite another thing to carry British subjects off the decks of a merchantman

flying a neutral flag; but if you knew the blasted rascals were deserters what difference did it make? Besides, what would become of the British navy, if you listened to all the fine-spun arguments of landmen? And if these stalwart blue-water Britishers could have read what Thomas Jefferson was writing at this very time, they would have classed him with the armchair critics who had no proper conception of a sailor's duty. "I hold the right of expatriation," wrote the President, "to be inherent in every man by the laws of nature, and incapable of being rightfully taken away from him even by the united will of every other person in the nation."

In the year 1805, while President Jefferson was still the victim of his overmastering passion, and disposed to cultivate the good will of England, if thereby he might obtain the Floridas, unforeseen commercial complications arose which not only blocked the way to a better understanding in Spanish affairs but strained diplomatic relations to the breaking point. News reached Atlantic seaports that American merchantmen, which had hitherto engaged with impunity in the carrying trade between Europe and the West Indies, had been seized and condemned in British admiralty courts. Every American shipmaster and owner at once lifted up

his voice in indignant protest; and all the latent hostility to their old enemy revived. Here were new orders-in-council, said they: the leopard cannot change his spots. England is still England — the implacable enemy of neutral shipping. “Never will neutrals be perfectly safe till free goods make free ships or till England loses two or three great naval battles,” declared the *Salem Register*.

The recent seizures were not made by orders-in-council, however, but in accordance with a decision recently handed down by the court of appeals in the case of the ship *Essex*. Following a practice which had become common in recent years, the *Essex* had sailed with a cargo from Barcelona to Salem and thence to Havana. On the high seas she had been captured, and then taken to a British port, where ship and cargo were condemned because the voyage from Spain to her colony had been virtually continuous, and by the so-called Rule of 1756, direct trade between a European state and its colony was forbidden to neutrals in time of war when such trade had not been permitted in time of peace. Hitherto, the British courts had inclined to the view that when goods had been landed in a neutral country and duties paid, the voyage had been broken. Tacitly a trade that was virtually direct

had been countenanced, because the payment of duties seemed evidence enough that the cargo became a part of the stock of the neutral country and, if reshipped, was then a *bona fide* neutral cargo. Suddenly English merchants and shippers woke to the fact that they were often victims of deception. Cargoes would be landed in the United States, duties ostensibly paid, and the goods ostensibly imported, only to be reshipped in the same bottoms, with the connivance of port officials, either without paying any real duties or with drawbacks. In the case of the *Essex* the court of appeals cut directly athwart these practices by going behind the *prima facie* payment and inquiring into the intent of the voyage. The mere touching at a port without actually importing the cargo into the common stock of the country did not alter the nature of the voyage. The crucial point was the intent, which the court was now and hereafter determined to ascertain by examination of facts. The court reached the indubitable conclusion that the cargo of the *Essex* had never been intended for American markets. The open-minded historian must admit that this was a fair application of the Rule of 1756, but he may still challenge the validity of the rule, as all neutral countries did, and the wisdom of the



monopolistic impulse which moved the commercial classes and the courts of England to this decision.<sup>1</sup>

Had the impressment of seamen and the spoliation of neutral commerce occurred only on the high seas, public resentment would have mounted to a high pitch in the United States; but when British cruisers ran into American waters to capture or burn French vessels, and when British men-of-war blockaded ports, detaining and searching — and at times capturing — American vessels, indignation rose to fever heat. The blockade of New York Harbor by two British frigates, the *Cambrian* and the *Leander*, exasperated merchants beyond measure. On board the *Leander* was a young midshipman, Basil Hall, who in after years described the activities of this execrated frigate.

Every morning at daybreak, we set about arresting the progress of all the vessels we saw, firing off guns to the right and left to make every ship that was running in heave to, or wait until we had leisure to send a boat on board "to see," in our lingo, "what she was made of." I have frequently known a dozen, and sometimes

<sup>1</sup> Professor William E. Lingelbach in a notable article on "England and Neutral Trade" in *The Military Historian and Economist* (April, 1917) has pointed out the error committed by almost every historian from Henry Adams down, that the *Essex* decision reversed previous rulings of the court and was not in accord with British law.



a couple of dozen, ships lying a league or two off the port, losing their fair wind, their tide, and worse than all their market, for many hours, sometimes the whole day, before our search was completed.<sup>1</sup>

One day in April, 1806, the *Leander*, trying to halt a merchantman that she meant to search, fired a shot which killed the helmsman of a passing sloop. The boat sailed on to New York with the mangled body; and the captain, brother of the murdered man, lashed the populace into a rage by his mad words. Supplies for the frigates were intercepted, personal violence was threatened to any British officers caught on shore, the captain of the *Leander* was indicted for murder, and the funeral of the murdered sailor was turned into a public demonstration. Yet nothing came of this incident, beyond a proclamation by the President closing the ports of the United States to the offending frigates and ordering the arrest of the captain of the *Leander* wherever found. After all, the death of a common seaman did not fire the hearts of farmers peacefully tilling their fields far beyond hearing of the *Leander's* guns.

A year full of troublesome happenings passed;

<sup>1</sup> *Fragments of Voyages and Travels*, quoted by Henry Adams, in *History of the United States*, vol. III, p. 92.

scores of American vessels were condemned in British admiralty courts, and American seamen were impressed with increasing frequency, until in the early summer of 1807 these manifold grievances culminated in an outrage that shook even Jefferson out of his composure and evoked a passionate outcry for war from all parts of the country.

While a number of British war vessels were lying in Hampton Roads watching for certain French frigates which had taken refuge up Chesapeake Bay, they lost a number of seamen by desertion under peculiarly annoying circumstances. In one instance a whole boat's crew made off under cover of night to Norfolk and there publicly defied their commander. Three deserters from the British frigate *Melampus* had enlisted on the American frigate *Chesapeake*, which had just been fitted out for service in the Mediterranean; but on inquiry these three were proven to be native Americans who had been impressed into British service. Unfortunately inquiry did disclose one British deserter who had enlisted on the *Chesapeake*, a loud-mouthed tar by the name of Jenkin Ratford. These irritating facts stirred Admiral Berkeley at Halifax to high-handed measures. Without waiting for instructions, he issued an order to all commanders in the

North Atlantic Squadron to search the *Chesapeake* for deserters, if she should be encountered on the high seas. This order of the 1st of June should be shown to the captain of the *Chesapeake* as sufficient authority for searching her.

On June 22, 1807, the *Chesapeake* passed unsuspecting between the capes on her way to the Mediterranean. She was a stanch frigate carrying forty guns and a crew of 375 men and boys; but she was at this time in a distressing state of unreadiness, owing to the dilatoriness and incompetence of the naval authorities at Washington. The gun-deck was littered with lumber and odds and ends of rigging; the guns, though loaded, were not all fitted to their carriages; and the crew was untrained. As the guns had to be fired by slow matches or by loggerheads heated red-hot, and the ammunition was stored in the magazine, the frigate was totally unprepared for action. Commodore Barron, who commanded the *Chesapeake*, counted on putting her into fighting trim on the long voyage across the Atlantic.

Just ahead of the *Chesapeake* as she passed out to sea was the *Leopard*, a British frigate of fifty-two guns, which was apparently on the lookout for suspicious merchantmen. It was not until both

vessels were eight miles or more southeast of Cape Henry that the movements of the *Leopard* began to attract attention. At about half-past three in the afternoon she came within hailing distance and hove to, announcing that she had dispatches for the commander. The *Chesapeake* also hove to and answered the hail, a risky move considering that she was unprepared for action and that the *Leopard* lay to the windward. But why should the commander of the American frigate have entertained suspicions?

A boat put out from the *Leopard*, bearing a petty officer, who delivered a note enclosing Admiral Berkeley's order and expressing the hope that "every circumstance . . . may be adjusted in a manner that the harmony subsisting between the two countries may remain undisturbed." Commodore Barron replied that he knew of no British deserters on his vessel and declined in courteous terms to permit his crew to be mustered by any other officers but their own. The messenger departed, and then, for the first time entertaining serious misgivings, Commodore Barron ordered his decks cleared for action. But before the crew could bestir themselves, the *Leopard* drew near, her men at quarters. The British commander shouted a

warning, but Barron, now thoroughly alarmed, replied, "I don't hear what you say." The warning was repeated, but again Barron to gain time shouted that he could not hear. The *Leopard* then fired two shots across the bow of the *Chesapeake*, and almost immediately without parleying further — she was now within two hundred feet of her victim — poured a broadside into the American vessel.

Confusion reigned on the *Chesapeake*. The crew for the most part showed courage, but they were helpless, for they could not fire a gun for want of slow matches or loggerheads. They crowded about the magazine clamoring in vain for a chance to defend the vessel; they yelled with rage at their predicament. Only one gun was discharged and that was by means of a live coal brought up from the galley after the *Chesapeake* had received a third broadside and Commodore Barron had ordered the flag to be hauled down to spare further slaughter. Three of his crew had already been killed and eighteen wounded, himself among the number. The whole action lasted only fifteen minutes.

Boarding crews now approached and several British officers climbed to the deck of the *Chesapeake* and mustered her crew. Among the ship's company they found the alleged deserters and, hiding

in the coal-hole, the notorious Jenkin Ratford. These four men they took with them, and the *Leopard*, having fulfilled her instructions, now suffered the *Chesapeake* to limp back to Hampton Roads. "For the first time in their history," writes Henry Adams,<sup>1</sup> "the people of the United States learned, in June, 1807, the feeling of a true national emotion. Hitherto every public passion had been more or less partial and one-sided; . . . but the outrage committed on the *Chesapeake* stung through hidebound prejudices, and made democrat and aristocrat writhe alike."

Had President Jefferson chosen to go to war at this moment, he would have had a united people behind him, and he was well aware that he possessed the power of choice. "The affair of the *Chesapeake* put war into my hand," he wrote some years later. "I had only to open it and let havoc loose." But Thomas Jefferson was not a martial character. The State Governors, to be sure, were requested to have their militia in readiness, and the Governor of Virginia was desired to call such companies into service as were needed for the defense of Norfolk. The President referred in indignant terms to the abuse of the laws of hospitality and the "outrage"

<sup>1</sup> *History of the United States*, vol. IV, p. 27.

committed by the British commander; but his proclamation only ordered all British armed vessels out of American waters and forbade all intercourse with them if they remained. The tone of the proclamation was so moderate as to seem pusillanimous. John Randolph called it an apology. Thomas Jefferson did not mean to have war. With that extraordinary confidence in his own powers, which in smaller men would be called smug conceit, he believed that he could secure disavowal and honorable reparation for the wrong committed; but he chose a frail intermediary when he committed this delicate mission to James Monroe.

## CHAPTER VIII

### THE PACIFISTS OF 1807

IT is one of the strange paradoxes of our time that the author of the Declaration of Independence, to whose principle of self-determination the world seems again to be turning, should now be regarded as a self-confessed pacifist, with all the derogatory implications that lurk in that epithet. The circumstances which made him a revolutionist in 1776 and a passionate advocate of peace in 1807 deserve some consideration. The charge made by contemporaries of Jefferson that his aversion to war sprang from personal cowardice may be dismissed at once, as it was by him, with contempt. Nor was his hatred of war merely an instinctive abhorrence of bloodshed. He had not hesitated to wage naval war on the Barbary Corsairs. It is true that he was temperamentally averse to the use of force under ordinary circumstances. He did not belong to that type of full-blooded men who find self-expression in



adventurous activity. Mere physical effort without conscious purpose never appealed to him. He was at the opposite pole of life from a man like Aaron Burr. He never, so far as history records, had an affair of honor; he never fought a duel; he never performed active military service; he never took human life. Yet he was not a non-resistant. "My hope of preserving peace for our country," he wrote on one occasion, "is not founded in the Quaker principle of non-resistance under every wrong."

The true sources of Jefferson's pacifism must be sought in his rationalistic philosophy, which accorded the widest scope to the principle of self-direction and self-determination, whether on the part of the individual or of groups of individuals. To impose one's will upon another was to enslave, according to his notion; to coerce by war was to enslave a community; and to enslave a community was to provoke revolution. Jefferson's thought gravitated inevitably to the center of his rational universe — to the principle of enlightened self-interest. Men and women are not to be permanently moved by force but by appeals to their interests. He completed his thought as follows in the letter already quoted: "But [my hope of preserving

peace is founded] in the belief that a just and friendly conduct on our part will procure justice and friendship from others. In the existing contest, each of the combatants will find an interest in our friendship.”

It was a chaotic world in which this philosopher-statesman was called upon to act—a world in which international law and neutral rights had been well-nigh submerged in twelve years of almost continuous war. Yet with amazing self-assurance President Jefferson believed that he held in his hand a master-key which would unlock all doors that had been shut to the commerce of neutrals. He called this master-key “peaceable coercion,” and he explained its magic potency in this wise:

Our commerce is so valuable to them [the European belligerents] that they will be glad to purchase it when the only price we ask is to do us justice. I believe that we have in our hands the means of peaceable coercion; and that the moment they see our government so united as that they can make use of it, they will for their own interest be disposed to do us justice.

The idea of using commercial restrictions as a weapon to secure recognition of rights was of course not original with Jefferson, but it was now to be given a trial without parallel in the history of the

nation. Non-importation agreements had proved efficacious in the struggle of the colonies with the mother country; it seemed not unreasonable to suppose that a well-sustained refusal to traffic in English goods would meet the emergency of 1807, when the ruling of British admiralty courts threatened to cut off the lucrative commerce between Europe and the West Indies. With this theory in view, the President and his Secretary of State advocated the Non-Importation Bill of April 18, 1806, which forbade the entry of certain specified goods of British manufacture. The opposition found a leader in Randolph, who now broke once and for all with the Administration. "Never in the course of my life," he exclaimed, "have I witnessed such a scene of indignity and inefficiency as this measure holds forth to the world. What is it? A milk-and-water bill! A dose of chicken-broth to be taken nine months hence! . . . It is too contemptible to be the object of consideration, or to excite the feelings of the pettiest state in Europe." The Administration carried the bill through Congress, but Randolph had the satisfaction of seeing his characterization of the measure amply justified by the course of events.

With the Non-Importation Act as a weapon, the

President was confident that Monroe, who had once more returned to his post in London, could force a settlement of all outstanding differences with Great Britain. To his annoyance, and to Monroe's chagrin, however, he was obliged to send a special envoy to act with Monroe. Factionous opposition in the Senate forced the President to placate the Federalists by appointing William Pinkney of Maryland. The American commissioners were instructed to insist upon three concessions in the treaty which they were to negotiate: restoration of trade with enemies' colonies, indemnity for captures made since the *Essex* decision, and express repudiation of the right of impressment. In return for these concessions, they might hold out the possible repeal of the Non-Importation Act! Only confirmed optimists could believe that the mistress of the seas, flushed with the victory of Trafalgar, would consent to yield these points for so slight a compensation. The mission was, indeed, doomed from the outset, and nothing more need be said of it than that in the end, to secure any treaty at all, Monroe and Pinkney broke their instructions and set aside the three ultimata. What they obtained in return seemed so insignificant and doubtful, and what they paid for even these slender

compensations seemed so exorbitant, that the President would not even submit the treaty to the Senate. The first application of the theory of peaceable coercion thus ended in humiliating failure. Jefferson thought it best "to let the negotiation take a friendly nap"; but Madison, who felt that his political future depended on a diplomatic triumph over England, drafted new instructions for the two commissioners, hoping that the treaty might yet be put into acceptable form. It was while these new instructions were crossing the ocean that the *Chesapeake* struck her colors.

James Monroe is one of the most unlucky diplomats in American history. From those early days when he had received the fraternal embraces of the Jacobins in Paris and had been recalled by President Washington, to the ill-fated Spanish mission, circumstances seem to have conspired against him. The honor of negotiating the purchase of Louisiana should have been his alone, but he arrived just a day too late and was obliged to divide the glory with Livingston. On this mission to England he was not permitted to conduct negotiations alone but was associated with William Pinkney, a Federalist. No wonder he suspected Madison, or at least

Madison's friends, of wishing to discredit him. And now another impossible task was laid upon him. He was instructed to demand not only disavowal and reparation for the attack on the *Chesapeake* and the restoration of the American seamen, but also as "an indispensable part of the satisfaction" "an entire abolition of impressments." If the Secretary of State had deliberately contrived to deliver Monroe into the hands of George Canning, he could not have been more successful, for Monroe had already protested against the *Chesapeake* outrage as an act of aggression which should be promptly disavowed without reference to the larger question of impressment. He was now obliged to eat his own words and inject into the discussion, as Canning put it, the irrelevant matters which they had agreed to separate from the present controversy. Canning was quick to see his opportunity. Mr. Monroe must be aware, said he, that on several recent occasions His Majesty had firmly declined to waive "the ancient and prescriptive usages of Great Britain, founded on the soundest principles of natural law," simply because they might come in contact with the interests or the feelings of the American people. If Mr. Monroe's instructions left him powerless to adjust this

regrettable incident of the *Leopard* and the *Chesapeake*, without raising the other question of the right of search and impressment, then His Majesty could only send a special envoy to the United States to terminate the controversy in a manner satisfactory to both countries. "But," added Canning with sarcasm which was not lost on Monroe, "in order to avoid the inconvenience which has arisen from the mixed nature of your instructions, that minister will not be empowered to entertain . . . any proposition respecting the search of merchant vessels."

One more humiliating experience was reserved for Monroe before his diplomatic career closed. Following Madison's new set of instructions, he and Pinkney attempted to reopen negotiations for the revision of the discredited treaty of the preceding year. But Canning had reasons of his own for wishing to be rid of a treaty which had been drawn by the late Whig Ministry. He informed the American commissioners arrogantly that "the proposal of the President of the United States for proceeding to negotiate anew upon the basis of a treaty already solemnly concluded and signed, is a proposal wholly inadmissible." His Majesty could therefore only acquiesce in the refusal of the President



to ratify the treaty. One week later, James Monroe departed from London, never again to set foot on British soil, leaving Pinkney to assume the duties of Minister at the Court of St. James. For the second time Monroe returned to his own country discredited by the President who had appointed him. In both instances he felt himself the victim of injustice. In spite of his friendship for Jefferson, he was embittered against the Administration and in this mood lent himself all too readily to the schemes of John Randolph, who had already picked him as the one candidate who could beat Madison in the next presidential election.

From the point of view of George Canning and the Tory squirearchy whose mouthpiece he was, the *Chesapeake* affair was but an incident — an unhappy incident, to be sure, but still only an incident — in the world-wide struggle with Napoleon. What was at stake was nothing less than the commercial supremacy of Great Britain. The astounding growth of Napoleon's empire was a standing menace to British trade. The overthrow of Prussia in the fall of 1806 left the Corsican in control of Central Europe and in a position to deal his long premeditated blow. A fortnight after the battle of Jena, he entered Berlin and there issued the famous



decree which was his answer to the British blockade of the French channel ports. Since England does not recognize the system of international law universally observed by all civilized nations — so the preamble read — but by a monstrous abuse of the right of blockade has determined to destroy neutral trade and to raise her commerce and industry upon the ruins of that of the continent, and since “whoever deals on the continent in English goods thereby favors and renders himself an accomplice of her designs,” therefore the British Isles are declared to be in a state of blockade. Henceforth all English goods were to be lawful prize in any territory held by the troops of France or her allies; and all vessels which had come from English ports or from English colonies were to be confiscated, together with their cargoes. This challenge was too much for the moral equilibrium of the squires, the shipowners, and the merchants who dominated Parliament. It dulled their sense of justice and made them impatient under the pin-pricks which came from the United States. “A few short months of war,” declared the *Morning Post* truculently, “would convince these desperate [American] politicians of the folly of measuring the strength of a rising, but still infant and puny, nation with the colossal power of

the British Empire." "Right," said the *Times*, another organ of the Tory Government, "is power sanctioned by usage." Concession to Americans at this crisis was not to be entertained for a moment, for after all, said the *Times*, they "possess all the vices of their Indian neighbors without their virtues."

In this temper the British Government was prepared to ignore the United States and deal Napoleon blow for blow. An order-in-council of January 7, 1807, asserted the right of retaliation and declared that "no vessel shall be permitted to trade from one port to another, both which ports shall belong to, or be in possession of France or her allies." The peculiar hardship of this order for American shipowners is revealed by the papers of Stephen Girard of Philadelphia, whose shrewdness and enterprise were making him one of the merchant princes of his time. One of his ships, the *Liberty*, of some 250 tons, was sent to Lisbon with a cargo of 2052 barrels and 220 half-barrels of flour which cost the owner \$10.68 a barrel. Her captain, on entering port, learned that flour commanded a better price at Cadiz. To Cadiz, accordingly, he set sail and sold his cargo for \$22.50 a barrel, winning for the owner a goodly profit

of \$25,000, less commission. It was such trading ventures as this that the British order-in-council doomed.

What American shipmasters had now to fear from both belligerents was made startlingly clear by the fate of the ship *Horizon*, which had sailed from Charleston, South Carolina, with a cargo for Zanzibar. On the way she touched at various South American ports and disposed of most of her cargo. Then changing her destination, and taking on a cargo for the English market, she set sail for London. On the way she was forced to put in at Lisbon to refit. As she left to resume her voyage she was seized by an English frigate and brought in as a fair prize, since — according to the Rule of 1756 — she had been apprehended in an illegal traffic between an enemy country and its colony. The British prize court condemned the cargo but released the ship. The unlucky *Horizon* then loaded with an English cargo and sailed again to Lisbon, but misfortune overtook her and she was wrecked off the French coast. Her cargo was salvaged, however, and what was not of English origin was restored to her owners by decree of a French prize court; the rest of her cargo was confiscated under the terms of the Berlin decree.

When the American Minister protested at this decision, he was told that "since America suffers her ships to be searched, she adopts the principle that the flag does not cover the goods. Since she recognizes the absurd blockades laid by England, consents to having her vessels incessantly stopped, sent to England, and so turned aside from their course, why should the Americans not suffer the blockade laid by France? Certainly France recognizes that these measures are unjust, illegal, and subversive of national sovereignty; but it is the duty of nations to resort to force, and to declare themselves against things which dishonor them and disgrace their independence."<sup>1</sup> But an invitation to enter the European maelstrom and battle for neutral rights made no impression upon the mild-tempered President.

It is as clear as day that the British Government was now determined, under pretense of retaliating upon France, to promote British trade with the continent by every means and at the expense of neutrals. Another order-in-council, November 11, 1807, closed to neutrals all European ports under French control, "as if the same were actually blockaded," but permitted vessels which first

<sup>1</sup> Henry Adams, *History of the United States*, iv, p. 110.

entered a British port and obtained a British license to sail to any continental port. It was an order which, as Henry Adams has said, could have but one purpose — to make American commerce English. This was precisely the contemporary opinion of the historian's grandfather, who declared that "the orders-in-council, if submitted to, would have degraded us to the condition of colonists."

Only one more blow was needed, it would seem, to complete the ruin of American commerce. It fell a month later, when Napoleon, having overrun the Spanish peninsula and occupied Portugal, issued his Milan decree of December 17, 1807. Henceforth any vessel which submitted to search by English cruisers, or paid any tonnage duty or tax to the English Government, or sailed to or from any English port, would be captured and condemned as lawful prize. Such was to be the maritime code of France "until England should return to the principles of international law which are also those of justice and honor."

Never was a commercial nation less prepared to defend itself against depredations than the United States of America in this year 1807. For this unpreparedness many must bear the blame, but President Jefferson has become the scapegoat. This

Virginia farmer and landsman was not only ignorant and distrustful of all the implements of war, but utterly unfamiliar with the ways of the sea and with the first principles of sea-power. The Tripolitan War seems to have inspired him with a single fixed idea — that for defensive purposes gunboats were superior to frigates and less costly. He set forth this idea in a special message to Congress (February 10, 1807), claiming to have the support of “professional men,” among whom he mentioned Generals Wilkinson and Gates! He proposed the construction of two hundred of these gunboats, which would be distributed among the various exposed harbors, where in time of peace they would be hauled up on shore under sheds, for protection against sun and storm. As emergency arose these floating batteries were to be manned by the seamen and militia of the port. What appealed particularly to the President in this programme was the immunity it offered from “an excitement to engage in offensive maritime war.” Gallatin would have modified even this plan for economy’s sake. He would have constructed only one-half of the proposed fleet since the large seaports could probably build thirty gunboats in as many days, if an emergency arose. In extenuation of Gallatin’s shortsightedness, it

should be remembered that he was a native of Switzerland, whose navy has never ploughed many seas. It is less easy to excuse the rest of the President's advisers and the Congress which was beguiled into accepting this naïve project. Nor did the *Chesapeake* outrage teach either Congress or the Administration a salutary lesson. On the contrary, when in October the news of the bombardment of Copenhagen had shattered the nerves of statesmen in all neutral countries, and while the differences with England were still unsettled, Jefferson and his colleagues decided to hold four of the best frigates in port and use them "as receptacles for enlisting seamen to fill the gunboats occasionally." Whom the gods would punish they first make mad!

The 17th of December was a memorable day in the annals of this Administration. Favorable tradewinds had brought into American ports a number of packets with news from Europe. The *Revenge* had arrived in New York with Armstrong's dispatches announcing Napoleon's purpose to enforce the Berlin decree; the *Edward* had reached Boston with British newspapers forecasting the order-in-council of the 11th of November. This news burst like a bomb in Washington where the genial



President was observing with scientific detachment the operation of his policy of commercial coercion. The Non-Importation Act had just gone into effect. Jefferson immediately called his Cabinet together. All were of one mind. The impending order-in-council, it was agreed, left but one alternative. Commerce must be totally suspended until the full scope of these new aggressions could be ascertained. The President took a loose sheet of paper and drafted hastily a message to Congress, recommending an embargo in anticipation of the offensive British order. But the prudent Madison urged that it was better not to refer explicitly to the order and proposed a substitute which simply recommended "an immediate inhibition of the departure of our vessels from the ports of the United States," on the ground that shipping was likely to be exposed to greater dangers. Only Gallatin demurred: he would have preferred an embargo for a limited time. "I prefer war to a permanent embargo," he wrote next day. "Government prohibitions," he added significantly, "do always more mischief than had been calculated." But Gallatin was overruled and the message, in Madison's form, was sent to Congress on the following day. The Senate immediately passed the desired bill through three



readings in a single day; the House confirmed this action after only two days of debate; and on the 22d of December, the President signed the Embargo Act.

What was this measure which was passed by Congress almost without discussion? Ostensibly it was an act for the protection of American ships, merchandise, and seamen. It forbade the departure of all ships for foreign ports, except vessels under the immediate direction of the President and vessels in ballast or already loaded with goods. Foreign armed vessels were exempted also as a matter of course. Coasting ships were to give bonds double the value of vessel and cargo to reland their freight in some port of the United States. Historians have discovered a degree of duplicity in the alleged motives for this act. How, it is asked, could protection of ships and seamen be the motive when all of Jefferson's private letters disclose his determination to put his theory of peaceable coercion to a practical test by this measure? The criticism is not altogether fair, for, as Jefferson would himself have replied, peaceable coercion was designed to force the withdrawal of orders-in-council and decrees that menaced the safety of ships and cargoes. The policy might entail some incidental hardships,

to be sure, but the end in view was protection of American lives and property. Madison was not quite candid, nevertheless, when he assured the British Minister that the embargo was a precautionary measure only and not conceived with hostile intent.

Chimerical this policy seemed to many contemporaries; chimerical it has seemed to historians, and to us who have passed through the World War. Yet in the World War it was the possession of food stuffs and raw materials by the United States which gave her a dominating position in the councils of the Allies. Had her commerce in 1807 been as necessary to England and France as it was "at the very peak" of the World War, Thomas Jefferson might have proved that peaceable coercion is an effective alternative to war; but he overestimated the magnitude and importance of the carrying trade of the United States, and erred still more grievously in assuming that a public conscience existed which would prove superior to the temptation to evade the law. Jefferson dreaded war quite as much because of its concomitants as because of its inevitable brutality, quite as much because it tended to exalt government and to produce corruption as because it maimed bodies and sacrificed human

lives. Yet he never took fully into account the possible accompaniments of his alternative to war. That the embargo would debauch public morals and make government arbitrary, he was to learn only by bitter experience and personal humiliation.

Just after the passage of this momentous act, Canning's special envoy, George Rose, arrived in the United States. A British diplomat of the better sort, with much dignity of manner and suave courtesy, he was received with more than ordinary consideration by the Administration. He was commissioned, every one supposed, to offer reparation for the *Chesapeake* affair. Even after he had notified Madison that his instructions bade him insist, as an indispensable preliminary, on the recall of the President's *Chesapeake* proclamation, he was treated with deference and assured that the President was prepared to comply, if he could do so without incurring the charge of inconsistency and disregard of national honor. Madison proposed to put a proclamation of recall in Rose's hands, duly signed by the President and dated so as to correspond with the day on which all differences should be adjusted. Rose consented to this course and the proclamation was delivered into his hands. He then divulged little by little his further instructions.

which were such as no self-respecting administration could listen to with composure. Canning demanded a formal disavowal of Commodore Barron's conduct in encouraging deserters from His Majesty's service and harboring them on board his ship. "You will state," read Rose's instructions, "that such disavowals, solemnly expressed, would afford to His Majesty a satisfactory pledge on the part of the American Government that the recurrence of similar causes will not on any occasion impose on His Majesty the necessity of authorizing those means of force to which Admiral Berkeley has resorted without authority, but which the continued repetition of such provocations as unfortunately led to the attack upon the *Chesapeake* might render necessary, as a just reprisal on the part of His Majesty." No doubt Rose did his best to soften the tone of these instructions, but he could not fail to make them clear; and Madison, who had conducted these informal interviews, slowly awoke to the real nature of what he was asked to do. He closed further negotiations with the comment that the United States could not be expected "to make, as it were, an expiatory sacrifice to obtain redress, or beg for reparation." The Administration determined to let the disavowal of Berkeley suffice for

the present and to allow the matter of reparation to await further developments. The coercive policy on which the Administration had now launched would, it was confidently believed, bring His Majesty's Government to terms.

The very suggestion of an embargo had an unexpected effect upon American shipmasters. To avoid being shut up in port fleets of ships put out to sea, half-manned, half-laden, and often without clearance papers. With freight rates soaring to unheard-of altitudes, ship-owners were willing to assume all the risks of the sea — British frigates included. So little did they appreciate the protection offered by a benevolent government that they assumed an attitude of hostility to authority and evaded the exactions of the law in every conceivable way. Under guise of engaging in the coasting trade, many a ship landed her cargo in a foreign port; a brisk traffic also sprang up across the Canadian border; and Amelia Island in St. Mary's River, Florida, became a notorious mart for illicit commerce. Almost at once Congress was forced to pass supplementary acts, conferring upon collectors of ports powers of inspection and regulation which Gallatin unhesitatingly pronounced both odious and dangerous. The President affixed his signature

ruefully to acts which increased the army, multiplied the number of gunboats under construction, and appropriated a million and a quarter dollars to the construction of coast defenses and the equipment of militia. "This embargo act," he confessed, "is certainly the most embarrassing we ever had to execute. I did not expect a crop of so sudden and rank growth of fraud and open opposition by force could have grown up in the United States."

The worst feature of the experiment was its ineffectiveness. The inhibition of commerce had so slight an effect upon England that when Pinkney approached Canning with the proposal of a *quid pro quo* — the United States to rescind the embargo, England to revoke her orders-in-council — he was told with biting sarcasm that "if it were possible to make any sacrifice for the repeal of the embargo without appearing to deprecate it as a measure of hostility, he would gladly have facilitated its removal *as a measure of inconvenient restriction upon the American people.*" By licensing American vessels, indeed, which had either slipped out of port before the embargo or evaded the collectors, the British Government was even profiting by this measure of restriction. It was these vagrant vessels which gave Napoleon his excuse for the Bayonne

decree of April 17, 1808, when with a stroke of the pen he ordered the seizure of all American ships in French ports and swept property to the value of ten million dollars into the imperial exchequer. Since these vessels were abroad in violation of the embargo, he argued, they could not be American craft but must be British ships in disguise. General Armstrong, writing from Paris, warned the Secretary of State not to expect that the embargo would do more than keep the United States at peace with the belligerents. As a coercive measure, its effect was nil. "Here it is not felt, and in England . . . it is forgotten."

Before the end of the year the failure of the embargo was patent to every fair-minded observer. Men might differ ever so much as to the harm wrought by the embargo abroad; but all agreed that it was not bringing either France or England to terms, and that it was working real hardship at home. Federalists in New England, where nearly one-third of the ships in the carrying trade were owned, pointed to the schooners "rotting at their wharves," to the empty shipyards and warehouses, to the idle sailors wandering in the streets of port towns, and asked passionately how long they must be sacrificed to the theories of this charlatan in the White



House. Even Southern Republicans were asking uneasily when the President would realize that the embargo was ruining planters who could not market their cotton and tobacco. And Republicans whose pockets were not touched were soberly questioning whether a policy that reduced the annual value of exports from \$108,000,000 to \$22,000,000, and cut the national revenue in half, had not been tested long enough.

Indications multiplied that "the dictatorship of Mr. Jefferson" was drawing to a close. In 1808, after the election of Madison as his successor, he practically abdicated as leader of his party, partly out of an honest conviction that he ought not to commit the President-elect by any positive course of action, and partly no doubt out of a less praiseworthy desire not to admit the defeat of his cherished principle. His abdication left the party without resolute leadership at a critical moment. Madison and Gallatin tried to persuade their party associates to continue the embargo until June, and then, if concessions were not forthcoming, to declare war; but they were powerless to hold the Republican majority together on this programme. Setting aside the embargo and returning to the earlier policy of non-intercourse, Congress adopted a measure



which excluded all English and French vessels and imports, but which authorized the President to renew trade with either country if it should mend its ways. On March 1, 1809, with much bitterness of spirit, Thomas Jefferson signed the bill which ended his great experiment. Martha Jefferson once said of her father that he never gave up a friend or an opinion. A few months before his death, he alluded to the embargo, with the pathetic insistence of old age, as "a measure, which, persevered in a little longer . . . would have effected its object completely."

## CHAPTER IX

### THE LAST PHASE OF PEACEABLE COERCION

THREE days after Jefferson gave his consent to the repeal of the embargo, the Presidency passed in succession to the second of the Virginia Dynasty. It was not an impressive figure that stood beside Jefferson and faced the great crowd gathered in the new Hall of Representatives at the Capitol. James Madison was a pale, extremely nervous, and obviously unhappy person on this occasion. For a masterful character this would have been the day of days; for Madison it was a fearful ordeal which sapped every ounce of energy. He trembled violently as he began to speak and his voice was almost inaudible. Those who could not hear him but who afterward read the Inaugural Address doubtless comforted themselves with the reflection that they had not missed much. The new President, indeed, had nothing new to say — no new policy to advocate. He could only repeat the old platitudes

about preferring "amicable discussion and reasonable accommodation of differences to a decision of them by an appeal to arms." Evidently, no strong assertion of national rights was to be expected from this plain, homespun President.

At the Inaugural Ball, however, people forgot their President in admiration of the President's wife, Dolly Madison. "She looked a queen," wrote Mrs. Margaret Bayard Smith. "She had on a pale buff-colored velvet, made plain, with a very long train, but not the least trimming, and beautiful pearl necklace, earrings, and bracelets. Her head dress was a turban of the same colored velvet and white satin (from Paris) with two superb plumes, the bird of paradise feathers. It would be *absolutely impossible* for any one to behave with more perfect propriety than she did. Unassuming dignity, sweetness, grace. Mr. Madison, on the contrary," continued this same warm-hearted observer, "seemed spiritless and exhausted. While he was standing by me, I said, 'I wish with all my heart I had a little bit of seat to offer you.' 'I wish so too,' said he, with a most woe-begone face, and looking as if he could hardly stand. The managers came up to ask him to stay to supper, he assented, and turning to me, 'but I would much rather be in bed,' he said."

Quite different was Mr. Jefferson on this occasion. He seemed to be in high spirits and "his countenance beamed with a benevolent joy." It seemed to this ardent admirer that "every demonstration of respect to Mr. M. gave Mr. J. more pleasure than if paid to himself." No wonder that Mr. Jefferson was in good spirits. Was he not now free from all the anxieties and worries of politics? Already he was counting on retiring "to the elysium of domestic affections and the irresponsible direction" of his own affairs. A week later he set out for Monticello on horseback, never again to set foot in the city which had witnessed his triumph and his humiliation.

The election of Madison had disclosed wide rifts in his party. Monroe had lent himself to the designs of John Randolph and had entered the list of candidates for the Presidency; and Vice-President Clinton had also been put forward by other malcontents. It was this division in the ranks of the opposition which in the end had insured Madison's election; but factional differences pursued Madison into the White House. Even in the choice of his official family he was forced to consider the preferences of politicians whom he despised, for when he would have appointed Gallatin Secretary of State,

he found Giles of Virginia and Samuel Smith of Maryland bent upon defeating the nomination. The Smith faction was, indeed, too influential to be ignored; with a wry face Madison stooped to a bargain which left Gallatin at the head of the Treasury but which saddled his Administration with Robert Smith, who proved to be quite unequal to the exacting duties of the Department of State.

The Administration began with what appeared to be a great diplomatic triumph. In April the President issued a proclamation announcing that the British orders-in-council would be withdrawn on the 10th of June, after which date commerce with Great Britain might be renewed. In the newspapers appeared, with this welcome proclamation, a note drafted by the British Minister Erskine expressing the confident hope that all differences between the two countries would be adjusted by a special envoy whom His Majesty had determined to send to the United States. The Republican press was jubilant. At last the sage of Monticello was vindicated. "It may be boldly alleged," said the *National Intelligencer*, "that the revocation of the British orders is attributable to the embargo."

Forgotten now were all the grievances against

Great Britain. Every shipping port awoke to new life. Merchants hastened to consign the merchandise long stored in their warehouses; shipmasters sent out runners for crews; and ships were soon winging their way out into the open sea. For three months American vessels crossed the ocean unmolested, and then came the bitter, the incomprehensible news that Erskine's arrangement had been repudiated and the over-zealous diplomat recalled. The one brief moment of triumph in Madison's administration had passed.

Slowly and painfully the public learned the truth. Erskine had exceeded his instructions. Canning had not been averse to concessions, it is true, but he had named as an indispensable condition of any concession that the United States should bind itself to exclude French ships of war from its ports. Instead of holding to the letter of his instructions, Erskine had allowed himself to be governed by the spirit of concession and had ignored the essential prerequisite. Nothing remained but to renew the Non-Intercourse Act against Great Britain. This the President did by proclamation on August 9, 1809, and the country settled back sullenly into commercial inactivity.

Another scarcely less futile chapter in diplomacy

began with the arrival of Francis James Jackson as British Minister in September. Those who knew this Briton were justified in concluding that conciliation had no important place in the programme of the Foreign Office, for it was he who, two years before, had conducted those negotiations with Denmark which culminated in the bombardment and destruction of Copenhagen. "It is rather a prevailing notion here," wrote Pinkney from London, "that this gentleman's conduct will not and cannot be what we all wish." And this impression was so fully shared by Madison that he would not hasten his departure from Montpelier but left Jackson to his own devices at the capital for a full month.

This interval of enforced inactivity had one unhappy consequence. Not finding employment for all his idle hours, Jackson set himself to read the correspondence of his predecessor, and from it he drew the conclusion that Erskine was a greater fool than he had thought possible, and that the American Government had been allowed to use language of which "every third word was a declaration of war." The further he read the greater his ire, so that when the President arrived in Washington (October 1), Jackson was fully resolved to let the American Government know what was due to a

British Minister who had had audiences "with most of the sovereigns of Europe."

Though neither the President nor Gallatin, to whose mature judgment he constantly turned, believed that Jackson had any proposals to make, they were willing to let Robert Smith carry on informal conversations with him. It speedily appeared that so far from making overtures, Jackson was disposed to await proposals. The President then instructed the Secretary of State to announce that further discussions would be "in the written form" and henceforth himself took direct charge of negotiations. The exchange of letters which followed reveals Madison at his best. His rapier-like thrusts soon pierced even the thick hide of this conceited Englishman. The stupid Smith who signed these letters appeared to be no mean adversary after all.

In one of his rejoinders the British Minister yielded to a flash of temper and insinuated (as Canning in his instructions had done) that the American Government had known Erskine's instructions and had encouraged him to set them aside — had connived in short at his wrongdoing. "Such insinuations," replied Madison sharply, "are inadmissible in the intercourse of a foreign



minister with a government that understands what it owes itself." "You will find that in my correspondence with you," wrote Jackson angrily, "I have carefully avoided drawing conclusions that did not necessarily follow from the premises advanced by me, and least of all should I think of uttering an insinuation where I was unable to substantiate a fact." A fatal outburst of temper which delivered the writer into the hands of his adversary. "Sir," wrote the President, still using the pen of his docile secretary, "finding that you have used a language which cannot be understood but as reiterating and even aggravating the same gross insinuation, it only remains, in order to preclude opportunities which are thus abused, to inform you that no further communications will be received from you." Therewith terminated the American mission of Francis James Jackson.

Following this diplomatic episode, Congress again sought a way of escape from the consequences of total non-intercourse. It finally enacted a bill known as Macon's Bill No. 2, which in a sense reversed the former policy, since it left commerce everywhere free, and authorized the President, "in case either Great Britain or France shall, before the

3d day of March next, so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States," to cut off trade with the nation which continued to offend. The act thus gave the President an immense discretionary power which might bring the country face to face with war. It was the last act in that extraordinary series of restrictive measures which began with the Non-Intercourse Act of 1806. The policy of peaceful coercion entered on its last phase.

And now, once again, the shadow of the Corsican fell across the seas. With the unerring shrewdness of an intellect never vexed by ethical considerations, Napoleon announced that he would meet the desires of the American Government. "I am authorized to declare to you, Sir," wrote the Duc de Cadore, Minister of Foreign Affairs, to Armstrong, "that the Decrees of Berlin and Milan are revoked, and that after November 1 they will cease to have effect — it being understood that in consequence of this declaration the English are to revoke their Orders-in-Council, and renounce the new principles of blockade which they have wished to establish; or that the United States, conformably to the Act you have just communicated [the Macon Act], cause their rights to be respected by the English."

It might be supposed that President Madison, knowing with whom he had to deal, would have hesitated to accept Napoleon's asseverations at their face value. He had, indeed, no assurances beyond Cadore's letter that the French decrees had been repealed. But he could not let slip this opportunity to force Great Britain's hand. It seemed to be a last chance to test the effectiveness of peaceable coercion. On November 2, 1810, he issued the momentous proclamation which eventually made Great Britain rather than France the object of attack. "It has been officially made known to this government," said the President, "that the said edicts of France have been so revoked as that they ceased, on the first day of the present month, to violate the neutral commerce of the United States." Thereupon the Secretary of the Treasury instructed collectors of customs that commercial intercourse with Great Britain would be suspended after the 2d of February of the following year.

The next three months were full of painful experiences for President Madison. He waited, and waited in vain, for authentic news of the formal repeal of the French decrees; and while he waited, he was distressed and amazed to learn that American

vessels were still being confiscated in French ports. In the midst of these uncertainties occurred the biennial congressional elections, the outcome of which only deepened his perplexities. Nearly one-half of those who sat in the existing Congress failed of reelection, yet, by a vicious custom, the new House, which presumably reflected the popular mood in 1810, would not meet for thirteen months, while the old discredited Congress wearily dragged out its existence in a last session. Vigorous presidential leadership, it is true, might have saved the expiring Congress from the reproach of incapacity, but such leadership was not to be expected from James Madison.

So it was that the President's message to this moribund Congress was simply a counsel of prudence and patience. It pointed out, to be sure, the uncertainties of the situation, but it did not summon Congress sternly to face the alternatives. It alluded mildly to the need of a continuance of our defensive and precautionary arrangements, and suggested further organization and training of the militia; it contemplated with satisfaction the improvement of the quantity and quality of the output of cannon and small arms; it set the seal of the President's approval upon the new military

academy; but nowhere did it sound a trumpet-call to real preparedness.

Even to these mild suggestions Congress responded indifferently. It slightly increased the naval appropriations, but it actually reduced the appropriations for the army; and it adjourned without acting on the bill authorizing the President to enroll fifty thousand volunteers. Personal animosity and prejudice combined to defeat the proposals of the Secretary of the Treasury. A bill to recharter the national bank, which Gallatin regarded as an indispensable fiscal agent, was defeated; and a bill providing for a general increase of duties on imports to meet the deficit was laid aside. Congress would authorize a loan of five million dollars but no new taxes. Only one bill was enacted which could be said to sustain the President's policy — that reviving certain parts of the Non-Intercourse Act of 1809 against Great Britain. With this last helpless gasp the Eleventh Congress expired.

The defeat of measures which the Administration had made its own amounted to a vote of no confidence. Under similar circumstances an English Ministry would have either resigned or tested the

sentiment of the country by a general election; but the American Executive possesses no such means of appealing immediately and directly to the electorate. President and Congress must live out their allotted terms of office, even though their antagonism paralyzes the operation of government. What, then, could be done to restore confidence in the Administration of President Madison and to establish a *modus vivendi* between Executive and Legislative?

It seemed to the Secretary of Treasury, smarting under the defeat of his bank bill, that he had become a burden to the Administration, an obstacle in the way of cordial coöperation between the branches of the Federal Government. The factions which had defeated his appointment to the Department of State seemed bent upon discrediting him and his policies. "I clearly perceive," he wrote to the President, "that my continuing a member of the present Administration is no longer of any public utility, invigorates the opposition against yourself, and must necessarily be attended with an increased loss of reputation by myself. Under those impressions, not without reluctance, and after perhaps hesitating too long in the hopes of a favorable change, I beg leave to tender you my resignation."

This timely letter probably saved the Administration. Not for an instant could the President consider sacrificing the man who for ten years had been the mainstay of Republican power. Madison acted with unwonted promptitude. He refused to accept Gallatin's resignation, and determined to break once and for all with the faction which had hounded Gallatin from the day of his appointment and which had foisted upon the President an unwelcome Secretary of State. Not Gallatin but Robert Smith should go. Still more surprising was Madison's quick decision to name Monroe as Smith's successor, if he could be prevailed upon to accept. Both Virginians understood the deeper personal and political significance of this appointment. Madison sought an alliance with a faction which had challenged his administrative policy; Monroe inferred that no opposition would be interposed to his eventual elevation to the Presidency when Madison should retire. What neither for the moment understood was the effect which the appointment would have upon the foreign policy of the Administration. Monroe hesitated, for he and his friends had been open critics of the President's pro-French policy. Was the new Secretary of State to be bound by this policy, or was the



President prepared to reverse his course and effect a reconciliation with England?

These very natural misgivings the President brushed aside by assuring Monroe's friends that he was very hopeful of settling all differences with both France and England. Certainly he had in no wise committed himself to a course which would prevent a renewal of negotiations with England; he had always desired "a cordial accommodation." Thus reassured, Monroe accepted the invitation, never once doubting that he would reverse the policy of the Administration, achieve a diplomatic triumph, and so appear as the logical successor to President Madison.

Had the new Secretary of State known the instructions which the British Foreign Office was drafting at this moment for Mr. Augustus J. Foster, Jackson's successor, he would have been less sanguine. This "very gentlemanlike young man," as Jackson called him, was told to make some slight concessions to American sentiment — he might make proper amends for the *Chesapeake* affair — but on the crucial matter of the French decrees he was bidden to hold rigidly to the uncompromising position taken by the Foreign Office from the beginning — that the President was mistaken in



thinking that they had been repealed. The British Government could not modify its orders-in-council on unsubstantiated rumors that the offensive French decrees had been revoked. Secretly Foster was informed that the Ministry was prepared to retaliate if the American Government persisted in shutting out British importations. No one in the Ministry, or for that matter in the British Isles, seems to have understood that the moment had come for concession and not retaliation, if peaceful relations were to continue.

It was most unfortunate that while Foster was on his way to the United States, British cruisers should have renewed the blockade of New York. Two frigates, the *Melampus* and the *Guerrière*, lay off Sandy Hook and resumed the old irritating practice of holding up American vessels and searching them for deserters. In the existing state of American feeling, with the *Chesapeake* outrage still unredressed, the behavior of the British commanders was as perilous as walking through a powder magazine with a live coal. The American navy had suffered severely from Jefferson's "chaste reformation" but it had not lost its fighting spirit. Officers who had served in the war with Tripoli prayed for a

fair chance to avenge the *Chesapeake*; and the Secretary of the Navy had abetted this spirit in his orders to Commodore John Rodgers, who was patrolling the coast with a squadron of frigates and sloops. "What has been perpetrated," Rodgers was warned, "may be again attempted. It is therefore our duty to be prepared and determined at every hazard to vindicate the injured honor of our navy, and revive the drooping spirit of the nation."

Under the circumstances it would have been little short of a miracle if an explosion had not occurred; yet for a year Rodgers sailed up and down the coast without encountering the British frigates. On May 16, 1811, however, Rodgers in his frigate, the *President*, sighted a suspicious vessel some fifty miles off Cape Henry. From her general appearance he judged her to be a man-of-war and probably the *Guerrière*. He decided to approach her, he relates, in order to ascertain whether a certain seaman alleged to have been impressed was aboard; but the vessel made off and he gave chase. By dusk the two ships were abreast. Exactly what then happened will probably never be known, but all accounts agree that a shot was fired and that a general engagement followed. Within fifteen minutes the strange vessel was disabled and lay

helpless under the guns of the *President*, with nine of her crew dead and twenty-three wounded. Then, to his intense disappointment, Rodgers learned that his adversary was not the *Guerrière* but the British sloop of war *Little Belt*, a craft greatly inferior to his own.

However little this one-sided sea fight may have salved the pride of the American navy, it gave huge satisfaction to the general public. The *Chesapeake* was avenged. When Foster disembarked he found little interest in the reparations which he was charged to offer. He had been prepared to settle a grievance in a good-natured way; he now felt himself obliged to demand explanations. The boot was on the other leg; and the American public lost none of the humor of the situation. Eventually he offered to disavow Admiral Berkeley's act, to restore the seamen taken from the *Chesapeake*, and to compensate them and their families. In the course of time the two unfortunates who had survived were brought from their prison at Halifax and restored to the decks of the *Chesapeake* in Boston Harbor. But as for the *Little Belt*, Foster had to rest content with the findings of an American court of inquiry which held that the British sloop had fired the first shot.

As yet there were no visible signs that Monroe had effected a change in the foreign policy of the Administration, though he had given the President a momentary advantage over the opposition. Another crisis was fast approaching. When Congress met a month earlier than usual, pursuant to the call of the President, the leadership passed from the Administration to a group of men who had lost all faith in commercial restrictions as a weapon of defense against foreign aggression.

## CHAPTER X

### THE WAR-HAWKS

AMONG the many unsolved problems which Jefferson bequeathed to his successor in office was that of the southern frontier. Running like a shuttle through the warp of his foreign policy had been his persistent desire to acquire possession of the Spanish Floridas. This dominant desire, amounting almost to a passion, had mastered even his better judgment and had created dilemmas from which he did not escape without the imputation of duplicity. On his retirement he announced that he was leaving all these concerns "to be settled by my friend, Mr. Madison," yet he could not resist the desire to direct the course of his successor. Scarcely a month after he left office he wrote, "I suppose the conquest of Spain will soon force a delicate question on you as to the Floridas and Cuba, which will offer themselves to you. Napoleon will certainly give his consent without difficulty to our

receiving the Floridas, and with some difficulty possibly Cuba."

In one respect Jefferson's intuition was correct. The attempt of Napoleon to subdue Spain and to seat his brother Joseph once again on the throne of Ferdinand VII was a turning point in the history of the Spanish colonies in America. One by one they rose in revolt and established revolutionary juntas either in the name of their deposed King or in professed coöperation with the insurrectionary government which was resisting the invader. Events proved that independence was the inevitable issue of all these uprisings from the Rio de la Plata to the Rio Grande.

In common with other Spanish provinces, West Florida felt the impact of this revolutionary spirit, but it lacked natural unity and a dominant Spanish population. The province was in fact merely a strip of coast extending from the Perdido River to the Mississippi, indented with bays into which great rivers from the north discharged their turgid waters. Along these bays and rivers were scattered the inhabitants, numbering less than one hundred thousand, of whom a considerable portion had come from the States. There, as always on the frontier, land had been a lodestone attracting both the

speculator and the homeseeker. In the parishes of West Feliciana and Baton Rouge, in the alluvial bottoms of the Mississippi, and in the settlements around Mobile Bay, American settlers predominated, submitting with ill grace to the exactions of Spanish officials who were believed to be as corrupt as they were inefficient.

If events had been allowed to take their natural course, West Florida would in all probability have fallen into the arms of the United States as Texas did three decades later. But the Virginia Presidents were too ardent suitors to await the slow progress of events; they meant to assist destiny. To this end President Jefferson had employed General Wilkinson, with indifferent success. President Madison found more trustworthy agents in Governor Claiborne of New Orleans and Governor Holmes of Mississippi, whose letters reveal the extent to which Madison was willing to meddle with destiny. "Nature had decreed the union of Florida with the United States," Claiborne affirmed; but he was not so sure that nature could be left to execute her own decrees, for he strained every nerve to prepare the way for American intervention when the people of West Florida should declare themselves free from Spain. Holmes also was instructed

to prepare for this eventuality and to coöperate with Claiborne in West Florida "in diffusing the impressions we wish to be made there."

The anticipated insurrection came off just when and where nature had decreed. In the summer of 1810 a so-called "movement for self-government" started at Bayou Sara and at Baton Rouge, where nine-tenths of the inhabitants were Americans. The leaders took pains to assure the Spanish Commandant that their motives were unimpeachable: nothing should be done which would in any wise conflict with the authority of their "loved and worthy sovereign, Don Ferdinand VII." They wished to relieve the people of the abuses under which they were suffering, but all should be done in the name of the King. The Commandant, De Lassus, was not without his suspicions of these patriotic gentlemen but he allowed himself to be swept along in the current. The several movements finally coalesced on the 25th of July in a convention near Baton Rouge, which declared itself "legally constituted to act in all cases of national concern . . . with the consent of the governor" and professed a desire "to promote the safety, honor, and happiness of our beloved king" as well as to rectify abuses in the province. It adjourned



with the familiar Spanish salutation which must have sounded ironical to the helpless De Lassus, "May God preserve you many years!" Were these pious professions farcical? Or were they the sincere utterances of men who, like the patriots of 1776, were driven by the march of events out of an attitude of traditional loyalty to the King into open defiance of his authority?

The Commandant was thus thrust into a position where his every movement would be watched with distrust. The pretext for further action was soon given. An intercepted letter revealed that De Lassus had written to Governor Folch for an armed force. That "act of perfidy" was enough to dissolve the bond between the convention and the Commandant. On the 23d of September, under cover of night, an armed force shouting "Hurrah! Washington!" overpowered the garrison of the fort at Baton Rouge, and three days later the convention declared the independence of West Florida, "appealing to the Supreme Ruler of the World" for the rectitude of their intentions. What their intentions were is clear enough. Before the ink was dry on their declaration of independence, they wrote to the Administration at Washington, asking for the immediate incorporation of West Florida into the Union.

Here was the blessed consummation of years of diplomacy near at hand. President Madison had only to reach out his hand and pluck the ripe fruit; yet he hesitated from constitutional scruples. Where was the authority which warranted the use of the army and navy to hold territory beyond the bounds of the United States? Would not intervention, indeed, be equivalent to an unprovoked attack on Spain, a declaration of war? He set forth his doubts in a letter to Jefferson and hinted at the danger which in the end was to resolve all his doubts. Was there not grave danger that West Florida would pass into the hands of a third and dangerous party? The conduct of Great Britain showed a propensity to fish in troubled waters.

On the 27th of October, President Madison issued a proclamation authorizing Governor Claiborne to take possession of West Florida and to govern it as part of the Orleans Territory. He justified his action, which had no precedent in American diplomacy, by reasoning which was valid only if his fundamental premise was accepted. West Florida, he repeated, as a part of the Louisiana purchase belonged to the United States; but without abandoning its claim, the United States had hitherto suffered Spain to continue in possession.

looking forward to a satisfactory adjustment by friendly negotiation. A crisis had arrived, however, which had subverted Spanish authority; and the failure of the United States to take the territory would threaten the interests of all parties and seriously disturb the tranquillity of the adjoining territories. In the hands of the United States, West Florida would "not cease to be a subject of fair and friendly negotiation." In his annual message President Madison spoke of the people of West Florida as having been "brought into the bosom of the American family," and two days later Governor Claiborne formally took possession of the country to the Pearl River. How territory which had thus been incorporated could still remain a subject of fair negotiation does not clearly appear, except on the supposition that Spain would go through the forms of a negotiation which could have but one outcome.

The enemies of the Administration seized eagerly upon the flaws in the President's logic, and pressed his defenders sorely in the closing session of the Eleventh Congress. Conspicuous among the champions of the Administration was young Henry Clay, then serving out the term of Senator Thurston of Kentucky who had resigned his office. This

eloquent young lawyer, now in his thirty-third year, had been born and bred in the Old Dominion — a typical instance of the American boy who had nothing but his own head and hands wherewith to make his way in the world. He had a slender schooling, a much-abbreviated law education in a lawyer's office, and little enough of that intellectual discipline needed for leadership at the bar; yet he had a clever wit, an engaging personality, and a rare facility in speaking, and he capitalized these assets. He was practising law in Lexington, Kentucky, when he was appointed to the Senate.

What this persuasive Westerner had to say on the American title to West Florida was neither new nor convincing; but what he advocated as an American policy was both bold and challenging. "The eternal principles of self preservation" justified in his mind the occupation of West Florida, irrespective of any title. With Cuba and Florida in the possession of a foreign maritime power, the immense extent of country watered by streams entering the Gulf would be placed at the mercy of that power. Neglect the proffered boon and some nation profiting by this error would seize this southern frontier. It had been intimated that Great Britain

might take sides with Spain to resist the occupation of Florida. To this covert threat Clay replied,

Sir, is the time never to arrive, when we may manage our own affairs without the fear of insulting his Britannic Majesty? Is the rod of British power to be forever suspended over our heads? Does the President refuse to continue a correspondence with a minister, who violates the decorum belonging to his diplomatic character, by giving and deliberately repeating an affront to the whole nation? We are instantly menaced with the chastisement which English pride will not fail to inflict. Whether we assert our rights by sea, or attempt their maintenance by land — whithersoever we turn ourselves, this phantom incessantly pursues us. Already has it had too much influence on the councils of the nation. It contributed to the repeal of the embargo — that dishonorable repeal, which has so much tarnished the character of our government. Mr. President, I have before said on this floor, and now take occasion to remark, that I most sincerely desire peace and amity with England; that I even prefer an adjustment of all differences with her, before one with any other nation. But if she persists in a denial of justice to us, or if she avails herself of the occupation of West Florida, to commence war upon us, I trust and hope that all hearts will unite, in a bold and vigorous vindication of our rights.

I am not, sir, in favour of cherishing the passion of conquest. But I must be permitted, in conclusion, to indulge the hope of seeing, ere long, the *new* United States (if you will allow me the expression) embracing.

not only the old thirteen States, but the entire country east of the Mississippi, including East Florida, and some of the territories of the north of us also.

Conquest was not a familiar word in the vocabulary of James Madison, and he may well have prayed to be delivered from the hands of his friends, if this was to be the keynote of their defense of his policy in West Florida. Nevertheless, he was impelled in spite of himself in the direction of Clay's vision. If West Florida in the hands of an unfriendly power was a menace to the southern frontier, East Florida from the Perdido to the ocean was not less so. By the 3d of January, 1811, he was prepared to recommend secretly to Congress that he should be authorized to take temporary possession of East Florida, in case the local authorities should consent or a foreign power should attempt to occupy it. And Congress came promptly to his aid with the desired authorization.

Twelve months had now passed since the people of the several States had expressed a judgment at the polls by electing a new Congress. The Twelfth Congress was indeed new in more senses than one. Some seventy representatives took their seats for the first time, and fully half of the familiar faces

were missing. Its first and most significant act, betraying a new spirit, was the choice as Speaker of Henry Clay, who had exchanged his seat in the Senate for the more stirring arena of the House. In all the history of the House there is only one other instance of the choice of a new member as Speaker. It was not merely a personal tribute to Clay but an endorsement of the forward-looking policy which he had so vigorously championed in the Senate. The temper of the House was bold and aggressive, and it saw its mood reflected in the mobile face of the young Kentuckian.

The Speaker of the House had hitherto followed English traditions, choosing rather to stand as an impartial moderator than to act as a legislative leader. For British traditions of any sort Clay had little respect. He was resolved to be the leader of the House, and if necessary to join his privileges as Speaker to his rights as a member, in order to shape the policies of Congress. Almost his first act as Speaker was to appoint to important committees those who shared his impatience with commercial restrictions as a means of coercing Great Britain. On the Committee on Foreign Relations — second to none in importance at this moment — he placed Peter B. Porter of New York, young John C.



Calhoun of South Carolina, and Felix Grundy of Tennessee; the chairmanship of the Committee on Naval Affairs he gave to Langdon Cheves of South Carolina; and the chairmanship of the Committee on Military Affairs, to another South Carolinian, David Williams. There was nothing fortuitous in this selection of representatives from the South and Southwest for important committee posts. Like Clay himself, these young intrepid spirits were solicitous about the southern frontier — about the ultimate disposal of the Floridas; like Clay, they had lost faith in temporizing policies; like Clay, they were prepared for battle with the old adversary if necessary.

In the President's message of November 5, 1811, there was just one passage which suited the mood of this group of younger Republicans. After a recital of injuries at the hands of the British ministry, Madison wrote with unwonted vigor: "With this evidence of hostile inflexibility in trampling on rights which no independent nation can relinquish Congress will feel the duty of putting the United States into an armor and an attitude demanded by the crisis; and corresponding with the national spirit and expectations." It was this part of the message which the Committee on Foreign Relations



took for the text of its report. The time had arrived, in the opinion of the committee, when forbearance ceased to be a virtue and when Congress must as a sacred duty "call forth the patriotism and resources of the country." Nor did the committee hesitate to point out the immediate steps to be taken if the country were to be put into a state of preparedness. Let the ranks of the regular army be filled and ten regiments added; let the President call for fifty thousand volunteers; let all available war-vessels be put in commission; and let merchant vessels arm in their own defense.

If these recommendations were translated into acts, they would carry the country appreciably nearer war; but the members of the committee were not inclined to shrink from the consequences. To a man they agreed that war was preferable to inglorious submission to continued outrages, and that the outcome of war would be positively advantageous. Porter, who represented the westernmost district of a State profoundly interested in the northern frontier, doubted not that Great Britain could be despoiled of her extensive provinces along the borders to the North. Grundy, speaking for the Southwest, contemplated with satisfaction the time when the British would be driven from the

continent. "I feel anxious," he concluded, "not only to add the Floridas to the South, but the Canadas to the North of this Empire." Others, like Calhoun, who now made his entrance as a debater, refused to entertain these mercenary calculations. "Sir," exclaimed Calhoun, his deep-set eyes flashing, "I only know of one principle to make a nation great, to produce in this country not the form but the real spirit of union, and that is, to protect every citizen in the lawful pursuit of his business. . . . Protection and patriotism are reciprocal."

But these young Republicans marched faster than the rank and file. Not so lightly were Jeffersonian traditions to be thrown aside. The old Republican prejudice against standing armies and sea-going navies still survived. Four weary months of discussion produced only two measures of military importance, one of which provided for the addition to the army of twenty-five thousand men enlisted for five years, and the other for the calling into service of fifty thousand state militia. The proposal of the naval committee to appropriate seven and a half million dollars to build a new navy was voted down; Gallatin's urgent appeal for new taxes fell upon deaf ears; and Congress proposed to meet the new military expenditure

by the dubious expedient of a loan of eleven million dollars.

A hesitation which seemed fatal paralyzed all branches of the Federal Government in the spring months. Congress was obviously reluctant to follow the lead of the radicals who clamored for war with Great Britain. The President was unwilling to recommend a declaration of war, though all evidence points to the conclusion that he and his advisers believed war inevitable. The nation was divided in sentiment, the Federalists insisting with some plausibility that France was as great an offender as Great Britain and pointing to the recent captures of American merchantmen by French cruisers as evidence that the decrees had not been repealed. Even the President was impressed by these unfriendly acts and soberly discussed with his mentor at Monticello the possibility of war with both France and England. There was a moment in March, indeed, when he was disposed to listen to moderate Republicans who advised him to send a special mission to England as a last chance.

What were the considerations which fixed the mind of the nation and of Congress upon war with Great Britain? Merely to catalogue the accumulated grievances of a decade does not suffice.

Nations do not arrive at decisions by mathematical computation of injuries received, but rather because of a sense of accumulated wrongs which may or may not be measured by losses in life and property. And this sense of wrongs is the more acute in proportion to the racial propinquity of the offender. The most bitter of all feuds are those between peoples of the same blood. It was just because the mother country from which Americans had won their independence was now denying the fruits of that independence that she became the object of attack. In two particulars was Great Britain offending and France not. The racial differences between French and American seamen were too conspicuous to countenance impressment into the navy of Napoleon. No injuries at the hands of France bore any similarity to the *Chesapeake* outrage. Nor did France menace the frontier and the frontier folk of the United States by collusion with the Indians.

To suppose that the settlers beyond the Alleghanies were eager to fight Great Britain solely for "free trade and sailors' rights" is to assume a stronger consciousness of national unity than existed anywhere in the United States at this time. These western pioneers had stronger and more

immediate motives for a reckoning with the old adversary. Their occupation of the Northwest had been hindered at every turn by the red man, who, they believed, had been sustained in his resistance directly by British traders and indirectly by the British Government. Documents now abundantly prove that the suspicion was justified. The key to the early history of the northwestern frontier is the fur trade. It was for this lucrative traffic that England retained so long the western posts which she had agreed to surrender by the Peace of Paris. Out of the region between the Illinois, the Wabash, the Ohio, and Lake Erie, pelts had been shipped year after year to the value annually of some £100,000, in return for the products of British looms and forges. It was the constant aim of the British trader in the Northwest to secure "the exclusive advantages of a valuable trade during Peace and the zealous assistance of brave and useful auxiliaries in time of War." To dispossess the redskin of his lands and to wrest the fur trade from British control was the equally constant desire of every full-blooded Western American. Henry Clay voiced this desire when he exclaimed in the speech already quoted, "The conquest of Canada is in your power. . . . Is it nothing to extinguish

the torch that lights up savage warfare? Is it nothing to acquire the entire fur-trade connected with that country, and to destroy the temptation and opportunity of violating your revenue and other laws?"<sup>1</sup>

The Twelfth Congress had met under the shadow of an impending catastrophe in the Northwest. Reports from all sources pointed to an Indian war of considerable magnitude. Tecumseh and his brother the Prophet had formed an Indian confederacy which was believed to embrace not merely the tribes of the Northwest but also the Creeks and Seminoles of the Gulf region. Persistent rumors strengthened long-nourished suspicions and connected this Indian unrest with the British agents on the Canadian border. In the event of war, so it was said, the British paymasters would let the redskins loose to massacre helpless women and children. Old men retold the outrages of these savage fiends during the War of Independence.

On the 7th of November — three days after the

<sup>1</sup> A memorial of the fur traders of Canada to the Secretary of State for War and Colonies (1814), printed as Appendix N to Davidson's *The North West Company*, throws much light on this obscure feature of Western history. See also an article on "The Insurgents of 1811," in the *American Historical Association Report* (1911) by D. R. Anderson.

assembling of Congress — Governor William Henry Harrison of the Indiana Territory encountered the Indians of Tecumseh's confederation at Tippecanoe and by a costly but decisive victory crushed the hopes of their chieftains. As the news of these events drifted into Washington, it colored perceptibly the minds of those who doubted whether Great Britain or France were the greater offender. Grundy, who had seen three brothers killed by Indians and his mother reduced from opulence to poverty in a single night, spoke passionately of that power which was taking every "opportunity of intriguing with our Indian neighbors and setting on the ruthless savages to tomahawk our women and children." "War," he exclaimed, "is not to commence by sea or land, it is already begun, and some of the richest blood of our country has been shed."

Still the President hesitated to lead. On the 31st of March, to be sure, he suffered Monroe to tell a committee of the House that he thought war should be declared before Congress adjourned and that he was willing to recommend an embargo if Congress would agree; but after an embargo for ninety days had been declared on the 4th of April, he told the British Minister that it was not,



could not be considered, a war measure. He still waited for Congress to shoulder the responsibility of declaring war. Why did he hesitate? Was he aware of the woeful state of unpreparedness everywhere apparent and was he therefore desirous of delay? Some color is given to this excuse by his efforts to persuade Congress to create two assistant secretaryships of war. Or was he conscious of his own inability to play the rôle of War-President?

The personal question which thrust itself upon Madison at this time was, indeed, whether he would have a second term of office. An old story, often told by his detractors, recounts a dramatic incident which is said to have occurred, just as the congressional caucus of the party was about to meet. A committee of Republican Congressmen headed by Mr. Speaker Clay waited upon the President to tell him, that if he wished a renomination, he must agree to recommend a declaration of war. The story has never been corroborated; and the dramatic interview probably never occurred; yet the President knew, as every one knew, that his renomination was possible only with the support of the war party. When he accepted the nomination from the Republican caucus on the 18th of May, he tacitly pledged himself to acquiesce in the plans of



the war-hawks. Some days later an authentic interview did take place between the President and a deputation of Congressmen headed by the Speaker, in the course of which the President was assured of the support of Congress if he would recommend a declaration. Subsequent events point to a complete understanding.

Clay now used all the latent powers of his office to aid the war party. Even John Randolph, ever a thorn in the side of the party, was made to wince. On the 29th of May, Randolph undertook to address the House on the declaration of war which, he had been credibly informed, was imminent. He was called to order by a member because no motion was before the House. He protested that his remarks were prefatory to a motion. The Speaker ruled that he must first make a motion. "My proposition is," responded Randolph sullenly, "that it is not expedient at this time to resort to a war against Great Britain." "Is the motion seconded?" asked the Speaker. Randolph protested that a second was not needed and appealed from the decision of the chair. Then, when the House sustained the Speaker, Randolph, having found a seconder, once more began to address the House. Again he was called to order; the House must first

vote to consider the motion. Randolph was beside himself with rage. The last vestige of liberty of speech was vanishing, he declared. But Clay was imperturbable. The question of consideration was put and lost. Randolph had found his master.

On the 1st of June the President sent to Congress what is usually denominated a war message; yet it contained no positive recommendation of war. "Congress must decide," said the President, "whether the United States shall continue passive" or oppose force to force. Prefaced to this impotent conclusion was a long recital of "progressive usurpations" and "accumulating wrongs" — a recital which had become so familiar in state papers as almost to lose its power to provoke popular resentment. It was significant, however, that the President put in the forefront of his catalogue of wrongs the impressment of American sailors on the high seas. No indignity touched national pride so keenly and none so clearly differentiated Great Britain from France as the national enemy. Almost equally provocative was the harassing of incoming and outgoing vessels by British cruisers which hovered off the coasts and even committed depredations within the territorial jurisdiction of the United States. Pretended blockades without an adequate force

was a third charge against the British Government, and closely connected with it that "sweeping system of blockades, under the name of orders-in-council," against which two Republican Administrations had struggled in vain.

There was in the count not an item, indeed, which could not have been charged against Great Britain in the fall of 1807, when the public clamored for war after the *Chesapeake* outrage. Four long years had been spent in testing the efficacy of commercial restrictions, and the country was if anything less prepared for the alternative. When President Madison penned this message he was, in fact, making public avowal of the breakdown of a great Jeffersonian principle. Peaceful coercion was proved to be an idle dream.

So well advised was the Committee on Foreign Relations to which the President's message was referred that it could present a long report two days later, again reviewing the case against the adversary in great detail. "The contest which is now forced on the United States," it concluded, "is radically a contest for their sovereignty and independency." There was now no other alternative than an immediate appeal to arms. On the same day Calhoun introduced a bill declaring war against

Great Britain; and on the 4th of June in secret session the war party mustered by the Speaker bore down all opposition and carried the bill by a vote of 79 to 49. On the 17th of June the Senate followed the House by the close vote of 19 to 14; and on the following day the President promptly signed the bill which marked the end of an epoch.

It is one of the bitterest ironies in history that just twenty-four hours before war was declared at Washington, the new Ministry at Westminster announced its intention of immediately suspending the orders-in-council. Had President Madison yielded to those moderates who advised him in April to send a minister to England, he might have been apprized of that gradual change in public opinion which was slowly undermining the authority of Spencer Perceval's ministry and commercial system. He had only to wait a little longer to score the greatest diplomatic triumph of his generation; but fate willed otherwise. No ocean cable flashed the news of the abrupt change which followed the tragic assassination of Perceval and the formation of a new ministry. When the slow-moving packets brought the tidings, war had begun.

## CHAPTER XI

### PRESIDENT MADISON UNDER FIRE

THE dire calamity which Jefferson and his colleagues had for ten years bent all their energies to avert had now befallen the young Republic. War, with all its train of attendant evils, stalked upon the stage, and was about to test the hearts of pacifist and war-hawk alike. But nothing marked off the younger Republicans more sharply from the generation to which Jefferson, Madison, and Gallatin belonged than the positive relief with which they hailed this break with Jeffersonian tradition. This attitude was something quite different from the usual intrepidity of youth in the face of danger; it was bottomed upon the conviction which Clay expressed when he answered the question, "What are we to gain by the war?" by saying, "What are we not to lose by peace? Commerce, character, a nation's best treasure, honor!" Calhoun had reached the

same conclusion. The restrictive system as a means of resistance and of obtaining redress for wrongs, he declared to be unsuited to the genius of the American people. It required the most arbitrary laws; it rendered government odious; it bred discontent. War, on the other hand, strengthened the national character, fed the flame of patriotism, and perfected the organization of government. "Sir," he exclaimed, "I would prefer a single victory over the enemy by sea or land to all the good we shall ever derive from the continuation of the non-importation act!" The issue was thus squarely faced: the alternative to peaceable coercion was now to be given a trial.

Scarcely less remarkable was the buoyant spirit with which these young Republicans faced the exigencies of war. Defeat was not to be found in their vocabulary. Clay pictured in fervent rhetoric a victorious army dictating the terms of peace at Quebec or at Halifax; Calhoun scouted the suggestion of unpreparedness, declaring that in four weeks after the declaration of war the whole of Upper and part of Lower Canada would be in our possession; and even soberer patriots believed that the conquest of Canada was only a matter of marching across the frontier to Montreal or

Quebec. But for that matter older heads were not much wiser as prophets of military events. Even Jefferson assured the President that he had never known a war entered into under more favorable auspices, and predicted that Great Britain would surely be stripped of all her possessions on this continent; while Monroe seems to have anticipated a short decisive war terminating in a satisfactory accommodation with England. As for the President, he averred many years later that while he knew the unprepared state of the country, "he esteemed it necessary to throw forward the flag of the country, sure that the people would press onward and defend it."

There is something at once humorous and pathetic in this self-portrait of Madison throwing forward the flag of his country and summoning his legions to follow on. Never was a man called to lead in war who had so little of the martial in his character, and yet so earnest a purpose to rise to the emergency. An observer describes him, the day after war was declared, "visiting in person — a thing never known before — all the offices of the Departments of War and the Navy, stimulating everything in a manner worthy of a little commander-in-chief, with his little round hat and huge



cockade." Stimulation was certainly needed in these two departments as events proved, but attention to petty details which should have been watched by subordinates is not the mark of a great commander. Jefferson afterward consoled Madison for the defeat of his armies by writing: "All you can do is to order — execution must depend on others and failures be imputed to them alone." Jefferson failed to perceive what Madison seems always to have forgotten, that a commander-in-chief who appoints and may remove his subordinates can never escape responsibility for their failures. The President's first duty was not to stimulate the performance of routine in the departments but to make sure of the competence of the executive heads of those departments.

William Eustis of Massachusetts, Secretary of War, was not without some little military experience, having served as a surgeon in the Revolutionary army, but he lacked every qualification for the onerous task before him. Senator Crawford of Georgia wrote to Monroe caustically that Eustis should have been forming general and comprehensive arrangements for the organization of the troops and for the prosecution of campaigns, instead of consuming his time reading advertisements

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of petty retailing merchants, to find where he could purchase one hundred shoes or two hundred hats. Of Paul Hamilton, the Secretary of Navy, even less could be expected, for he seems to have had absolutely no experience to qualify him for the post. Senator Crawford intimated that in instructing his naval officers Hamilton impressed upon them the desirability of keeping their superiors supplied with pineapples and other tropical fruits—an ill-natured comment which, true or not, gives us the measure of the man. Both Monroe and Gallatin shared the prevailing estimate of the Secretaries of War and of the Navy and expressed themselves without reserve to Jefferson; but the President with characteristic indecision hesitated to purge his Cabinet of these two incompetents, and for his want of decision he paid dearly.

The President had just left the Capital for his country place at Montpelier toward the end of August, when the news came that General William Hull, who had been ordered to invade Upper Canada and begin the military promenade to Quebec, had surrendered Detroit and his entire army without firing a gun. It was a crushing disaster and a well-deserved rebuke for the Administration, for whether the fault was Hull's or Eustis's,

the President had to shoulder the responsibility. His first thought was to retrieve the defeat by commissioning Monroe to command a fresh army for the capture of Detroit; but this proposal which appealed strongly to Monroe had to be put aside — fortunately for all concerned, for Monroe's desire for military glory was probably not equalled by his capacity as a commander and the western campaign proved incomparably more difficult than wiseacres at Washington imagined.

What was needed, indeed, was not merely able commanders in the field, though they were difficult enough to find. There was much truth in Jefferson's naïve remark to Madison: "The creator has not thought proper to mark those on the forehead who are of the stuff to make good generals. We are first, therefore, to seek them, blindfold, and then let them learn the trade at the expense of great losses." But neither seems to have comprehended that their opposition to military preparedness had caused this dearth of talent and was now forcing the Administration to select blindfold. More pressing even than the need of tacticians was the need of organizers of victory. The utter failure of the Niagara campaign vacated the office of Secretary of War; and with Eustis retired also the

Secretary of the Navy. Monroe took over the duties of the one temporarily, and William Jones, a shipowner of Philadelphia, succeeded Hamilton.

If the President seriously intended to make Monroe Secretary of War and the head of the General Staff, he speedily discovered that he was powerless to do so. The Republican leaders in New York felt too keenly Josiah Quincy's taunt about a despotic Cabinet "composed, to all efficient purposes, of two Virginians and a foreigner" to permit Monroe to absorb two cabinet posts. To appease this jealousy of Virginia, Madison made an appointment which very nearly shipwrecked his Administration: he invited General John Armstrong of New York to become Secretary of War. Whatever may be said of Armstrong's qualifications for the post, his presence in the Cabinet was most inadvisable, for he did not and could not inspire the personal confidence of either Gallatin or Monroe. Once in office, he turned Monroe into a relentless enemy and fairly drove Gallatin out of office in disgust by appointing his old enemy, William Duane, editor of the *Aurora*, to the post of Adjutant-General. "And Armstrong!" — said Dallas who subsequently as Secretary of War knew whereof he spoke — "he was

the devil from the beginning, is now, and ever will be!"

The man of clearest vision in these unhappy months of 1812 was undoubtedly Albert Gallatin. The defects of Madison as a War-President he had long foreseen; the need of reorganizing the Executive Departments he had pointed out as soon as war became inevitable; and the problem of financing the war he had attacked farsightedly, fearlessly, and without regard to political consistency. No one watched the approach of hostilities with a bitterer sense of blasted hopes. For ten years he had labored to limit expenditures, sacrificing even the military and naval establishments, that the people might be spared the burden of needless taxes; and within this decade he had also scaled down the national debt one-half, so that posterity might not be saddled with burdens not of its own choosing. And now war threatened to undo his work. The young republic was after all not to lead its own life, realize a unique destiny, but to tread the old well-worn path of war, armaments, and high-handed government. Well, he would save what he could, do his best to avert "perpetual taxation, military establishments, and other corrupting or anti-republican habits or institutions."

If Gallatin at first underrated the probable revenue for war purposes, he speedily confessed his error and set before Congress inexorably the necessity for new taxes — aye, even for an internal tax, which he had once denounced as loudly as any Republican. For more than a year after the declaration of war, Congress was deaf to pleas for new sources of revenue; and it was not, indeed, until the last year of the war that it voted the taxes which in the long run could alone support the public credit. Meantime, facing a depleted Treasury, Gallatin found himself reduced to a mere “dealer of loans” — a position utterly abhorrent to him. Even his efforts to place the loans which Congress authorized must have failed but for the timely aid of three men whom Quincy would have contemptuously termed foreigners, for all like Gallatin were foreign-born — Astor, Girard, and Parish. Utterly weary of his thankless job, Gallatin seized upon the opportunity afforded by the Russian offer of mediation to leave the Cabinet and perhaps to end the war by a diplomatic stroke. He asked and received an appointment as one of the three American commissioners.

If Madison really believed that the people of the United States would unitedly press onward and

defend the flag when once he had thrown it forward, he must have been strangely insensitive to the disaffection in New England. Perhaps, like Jefferson in the days of the embargo, he mistook the spirit of this opposition, thinking that it was largely partisan clamor which could safely be disregarded. What neither of these Virginians appreciated was the peculiar fanatical and sectional character of this Federalist opposition, and the extremes to which it would go. Yet abundant evidence lay before their eyes. Thirty-four Federalist members of the House, nearly all from New England, issued an address to their constituents bitterly arraiging the Administration and deploring the declaration of war; the House of Representatives of Massachusetts, following this example, published another address, denouncing the war as a wanton sacrifice of the best interests of the people and imploring all good citizens to meet in town and county assemblies to protest and to resolve not to volunteer except for a defensive war; and a meeting of citizens of Rockingham County, New Hampshire, adopted a memorial drafted by young Daniel Webster, which hinted that the separation of the States — “an event fraught with incalculable evils” — might sometime occur on just such an occasion as

this. Town after town, and county after county, took up the hue and cry, keeping well within the limits of constitutional opposition, it is true, but weakening the arm of the Government just when it should have struck the enemy effective blows.

Nor was the President without enemies in his own political household. The Republicans of New York, always lukewarm in their support of the Virginia Dynasty, were now bent upon preventing his reelection. They found a shrewd and not over-scrupulous leader in DeWitt Clinton and an adroit campaign manager in Martin Van Buren. Both belonged to that school of New York politicians of which Burr had been master. Anything to beat Madison was their cry. To this end they were willing to condemn the war-policy, to promise a vigorous prosecution of the war, and even to negotiate for peace. What made this division in the ranks of the Republicans so serious was the willingness of the New England Federalists to make common cause with Clinton. In September a convention of Federalists endorsed his nomination for the Presidency.

Under the weight of accumulating disasters, military and political, it seemed as though Madison must go down in defeat. Every New England



State but Vermont cast its electoral votes for Clinton; all the Middle States but Pennsylvania also supported him; and Maryland divided its vote. Only the steadiness of the Southern Republicans and of Pennsylvania saved Madison; a change of twenty electoral votes would have ended the Virginia Dynasty.<sup>1</sup> Now at least Madison must have realized the poignant truth which the Federalists were never tired of repeating: he had entered upon the war as President of a divided people.

Only a few months' experience was needed to convince the military authorities at Washington that the war must be fought mainly by volunteers. Every military consideration derived from American history warned against this policy, it is true, but neither Congress nor the people would entertain for an instant the thought of conscription. Only with great reluctance and under pressure had Congress voted to increase the regular army and to authorize the President to raise fifty thousand volunteers. The results of this legislation were disappointing, not to say humiliating. The conditions of enlistment were not such as to encourage recruiting; and even when the pay had been increased and the term of service shortened, few

<sup>1</sup> In the electoral vote Madison received 128; Clinton, 89.



able-bodied citizens would respond. If any such desired to serve their country, they enrolled in the State militia which the President had been authorized to call into active service for six months.

In default of a well-disciplined regular army and an adequate volunteer force, the Administration was forced more and more to depend upon such quotas of militia as the States would supply. How precarious was the hold of the national Government upon the State forces, appeared in the first months of the war. When called upon to supply troops to relieve the regulars in the coast defenses, the governors of Massachusetts and Connecticut flatly refused, holding that the commanders of the State militia, and not the President, had the power to decide when exigencies demanded the use of the militia in the service of the United States. In his annual message Madison termed this "a novel and unfortunate exposition" of the Constitution, and he pointed out — what indeed was sufficiently obvious — that if the authority of the United States could be thus frustrated during actual war, "they are not one nation for the purpose most of all requiring it." But what was the President to do? Even if he, James Madison, author of the Virginia Resolutions of 1798, could so forget his political creed as to

conceive of coercing a sovereign state, where was the army which would do his bidding? The President was the victim of his own political theory.

These bitter revelations of 1812 — the disaffection of New England, the incapacity of two of his secretaries, the disasters of his staff officers on the frontier, the slow recruiting, the defiance of Massachusetts and Connecticut — almost crushed the President. Never physically robust, he succumbed to an insidious intermittent fever in June and was confined to his bed for weeks. So serious was his condition that Mrs. Madison was in despair and scarcely left his side for five long weeks. “Even now,” she wrote to Mrs. Gallatin, at the end of July, “I watch over him as I would an infant, so precarious is his convalescence.” The rumor spread that he was not likely to survive, and politicians in Washington began to speculate on the succession to the Presidency.

But now and then a ray of hope shot through the gloom pervading the White House and Capitol. The stirring victory of the *Constitution* over the *Guerrière* in August, 1812, had almost taken the sting out of Hull’s surrender at Detroit, and other victories at sea followed, glorious in the annals of American naval warfare, though without decisive

influence on the outcome of the war. Of much greater significance was Perry's victory on Lake Erie in September, 1813, which opened the way to the invasion of Canada. This brilliant combat followed by the Battle of the Thames cheered the President in his slow convalescence. Encouraging, too, were the exploits of American privateers in British waters, but none of these events seemed likely to hasten the end of the war. Great Britain had already declined the Russian offer of mediation.

Last day but one of the year 1813 a British schooner, the *Bramble*, came into the port of Annapolis bearing an important official letter from Lord Castlereagh to the Secretary of State. With what eager and anxious hands Monroe broke the seal of this letter may be readily imagined. It might contain assurances of a desire for peace; it might indefinitely prolong the war. In truth the letter pointed both ways. Castlereagh had declined to accept the good offices of Russia, but he was prepared to begin direct negotiations for peace. Meantime the war must go on — with the chances favoring British arms, for the *Bramble* had also brought the alarming news of Napoleon's defeat on the plains of Leipzig. Now for the first time

Great Britain could concentrate all her efforts upon the campaign in North America. No wonder the President accepted Castlereagh's offer with alacrity. To the three commissioners sent to Russia, he added Henry Clay and Jonathan Russell and bade them Godspeed while he nerved himself to meet the crucial year of the war.

Had the President been fully apprized of the elaborate plans of the British War Office, his anxieties would have been multiplied many times. For what resources had the Government to meet invasion on three frontiers? The Treasury was again depleted; new loans brought in insufficient funds to meet current expenses; recruiting was slack because the Government could not compete with the larger bounties offered by the States; by summer the number of effective regular troops was only twenty-seven thousand all told. With this slender force, supplemented by State levies, the military authorities were asked to repel invasion. The Administration had not yet drunk the bitter dregs of the cup of humiliation.

That some part of the invading British forces might be detailed to attack the Capital was vaguely divined by the President and his Cabinet; but no adequate measures had been taken for the

defense of the city when, on a fatal August day, the British army marched upon it. The humiliating story of the battle of Bladensburg has been told elsewhere. The disorganized mob which had been hastily assembled to check the advance of the British was utterly routed almost under the eyes of the President, who with feelings not easily described found himself obliged to join the troops fleeing through the city. No personal humiliation was spared the President and his family. Dolly Madison, never once doubting that the noise of battle which reached the White House meant an American victory, stayed calmly indoors until the rush of troops warned her of danger. She and her friends were then swept along in the general rout. She was forced to leave her personal effects behind, but her presence of mind saved one treasure in the White House — a large portrait of General Washington painted by Gilbert Stuart. That priceless portrait and the plate were all that survived. The fleeing militiamen had presence of mind enough to save a large quantity of the wine by drinking it, and what was left, together with the dinner on the table, was consumed by Admiral Cockburn and his staff. By nightfall the White House, the Treasury, and the War Office were in

flames, and only a severe thunderstorm checked the conflagration.<sup>1</sup>

Heartsick and utterly weary, the President crossed the Potomac at about six o'clock in the evening and started westward in a carriage toward Montpelier. He had been in the saddle since early morning and was nearly spent. To fatigue was added humiliation, for he was forced to travel with a crowd of embittered fugitives and sleep in a forlorn house by the wayside. Next morning he overtook Mrs. Madison at an inn some sixteen miles from the Capital. Here they passed another day of humiliation, for refugees who had followed the same line of flight reviled the President for betraying them and the city. At midnight, alarmed at a report that the British were approaching, the President fled to another miserable refuge deeper in the Virginia woods. This fear of capture was quite unfounded, however, for the British troops had already evacuated the city and were marching in the opposite direction.

<sup>1</sup> Before passing judgment on the conduct of British officers and men, in the capital, the reader should recall the equally indefensible outrages committed by American troops under General Dearborn in 1813, when the Houses of Parliament and other public buildings at York (Toronto) were pillaged and burned. See Kingsford's *History of Canada*, VIII, pp. 259-61.

Two days later the President returned to the capital to collect his Cabinet and repair his shattered Government. He found public sentiment hot against the Administration for having failed to protect the city. He had even to fear personal violence, but he remained "tranquil as usual . . . though much distressed by the dreadful event which had taken place." He was still more distressed, however, by the insistent popular clamor for a victim for punishment. All fingers pointed at Armstrong as the man responsible for the capture of the city. Armstrong offered to resign at once, but the President in distress would not hear of resignation. He would advise only "a temporary retirement" from the city to placate the inhabitants. So Armstrong departed, but by the time he reached Baltimore he realized the impossibility of his situation and sent his resignation to the President. The victim had been offered up. At his own request Monroe was now made Secretary of War, though he continued also to discharge the not very heavy duties of the State Department.

It was a disillusioned group of Congressmen who gathered in September, 1814, in special session at the President's call. Among those who gazed sadly



at the charred ruins of the Capitol were Calhoun, Cheves, and Grundy, whose voices had been loud for war and who had pictured their armies overrunning the British possessions. Clay was at this moment endeavoring to avert a humiliating surrender of American claims at Ghent. To the sting of defeated hopes was added physical discomfort. The only public building which had escaped the general conflagration was the Post and Patent Office. In these cramped quarters the two houses awaited the President's message.

A visitor from another planet would have been strangely puzzled to make the President's words tally with the havoc wrought by the enemy on every side. A series of achievements had given new luster to the American arms; "the pride of our naval arms had been amply supported"; the American people had "rushed with enthusiasm to the scenes where danger and duty call." Not a syllable about the disaster at Washington! Not a word about the withdrawal of the Connecticut militia from national service, and the refusal of the Governor of Vermont to call out the militia just at the moment when Sir George Prevost began his invasion of New York; not a word about the general suspension of specie payment by all banks outside



of New England; not a word about the failure of the last loan and the imminent bankruptcy of the Government. Only a single sentence betrayed the anxiety which was gnawing Madison's heart: "It is not to be disguised that the situation of our country calls for its greatest efforts." What the situation demanded, he left his secretaries to say.

The new Secretary of War seemed to be the one member of the Administration who was prepared to grapple with reality and who had the courage of his convictions. While Jefferson was warning him that it was nonsense to talk about a regular army, Monroe told Congress flatly that no reliance could be placed in the militia and that a permanent force of one hundred thousand men must be raised — raised by conscription if necessary. Throwing Virginian and Jeffersonian principles to the winds, he affirmed the constitutional right of Congress to draft citizens. The educational value of war must have been very great to bring Monroe to this conclusion, but Congress had not traveled so far. One by one Monroe's alternative plans were laid aside; and the country, like a rudderless ship, drifted on.

An insuperable obstacle, indeed, prevented the establishment of any efficient national army at this

time. Every plan encountered ultimately the inexorable fact that the Treasury was practically empty and the credit of the Government gone. Secretary Campbell's report was a confession of failure to sustain public credit. Some seventy-four millions would be needed to carry the existing civil and military establishments for another year, and of this sum, vast indeed in those days, only twenty-four millions were in sight. Where the remaining fifty millions were to be found, the Secretary could not say. With this admission of incompetence Campbell resigned from office. On the 9th of November his successor, A. J. Dallas, notified holders of government securities at Boston that the Treasury could not meet its obligations.

It was at this crisis, when bankruptcy stared the Government in the face, that the Legislature of Massachusetts appointed delegates to confer with delegates from other New England legislatures on their common grievances and dangers and to devise means of security and defense. The Legislatures of Connecticut and Rhode Island responded promptly by appointing delegates to meet at Hartford on the 15th of December; and the proposed convention seemed to receive popular indorsement in the congressional elections, for with but two

exceptions all the Congressmen chosen were Federalists. Hot-heads were discussing without any attempt at concealment the possibility of reconstructing the Federal Union. A new union of the good old Thirteen States on terms set by New England was believed to be well within the bounds of possibility. News-sheets referred enthusiastically to the erection of a new Federal edifice which should exclude the Western States. Little wonder that the harassed President in distant Washington was obsessed with the idea that New England was on the verge of secession.

William Wirt who visited Washington at this time has left a vivid picture of ruin and desolation:

I went to look at the ruins of the President's house. The rooms which you saw so richly furnished, exhibited nothing but unroofed naked walls, cracked, defaced, and blackened with fire. I cannot tell you what I felt as I walked amongst them. . . . I called on the President. He looks miserably shattered and woe-begone. In short, he looked heartbroken. His mind is full of the New England sedition. He introduced the subject, and continued to press it, — painful as it obviously was to him. I denied the probability, even the *possibility* that the yeomanry of the North could be induced to place themselves under the power and protection of England, and diverted the conversation to another topic; but he took the first opportunity to return

to it, and convinced me that his heart and mind were painfully full of the subject.

What added to the President's misgivings was the secrecy in which the members of the Hartford Convention shrouded their deliberations. An atmosphere of conspiracy seemed to envelop all their proceedings. That the "deliverance of New England" was at hand was loudly proclaimed by the Federalist press. A reputable Boston news-sheet advised the President to procure a faster horse than he had mounted at Bladensburg, if he would escape the swift vengeance of New England.

The report of the Hartford Convention seemed hardly commensurate with the fears of the President or with the windy boasts of the Federalist press. It arraigned the Administration in scathing language, to be sure, but it did not advise secession. "The multiplied abuses of bad administrations" did not yet justify a severance of the Union, especially in a time of war. The manifest defects of the Constitution were not incurable; yet the infractions of the Constitution by the National Government had been so deliberate, dangerous, and palpable as to put the liberties of the people in jeopardy and to constrain the several States to interpose their authority to protect their citizens. The legislatures

of the several States were advised to adopt measures to protect their citizens against such unconstitutional acts of Congress as conscription and to concert some arrangement with the Government at Washington, whereby they jointly or separately might undertake their own defense, and retain a reasonable share of the proceeds of Federal taxation for that purpose. To remedy the defects of the Constitution seven amendments were proposed, all of which had their origin in sectional hostility to the ascendancy of Virginia and to the growing power of the New West. The last of these proposals was a shot at Madison and Virginia: "nor shall the President be elected from the same State two terms in succession." And finally, should these applications of the States for permission to arm in their own defense be ignored, then and in the event that peace should not be concluded, another convention should be summoned "with such powers and instructions as the exigency of a crisis so momentous may require."

Massachusetts, under Federalist control, acted promptly upon these suggestions. Three commissioners were dispatched to Washington to effect the desired arrangements for the defense of the State. The progress of these "three ambassadors,"

as they styled themselves, was followed with curiosity if not with apprehension. In Federalist circles there was a general belief that an explosion was at hand. A disaster at New Orleans, which was now threatened by a British fleet and army, would force Madison to resign or to conclude peace. But on the road to Washington, the ambassadors learned to their surprise that General Andrew Jackson had decisively repulsed the British before New Orleans, on the 8th of January, and on reaching the Capital they were met by the news that a treaty of peace had been signed at Ghent. Their cause was not only discredited but made ridiculous. They and their mission were forgotten as the tension of war times relaxed. The Virginia Dynasty was not to end with James Madison.

## CHAPTER XII

### THE PEACEMAKERS

ON a May afternoon in the year 1813, a little three-hundred-ton ship, the *Neptune*, put out from New Castle down Delaware Bay. Before she could clear the Capes she fell in with a British frigate, one of the blockading squadron which was already drawing its fatal cordon around the seaboard States. The captain of the *Neptune* boarded the frigate and presented his passport, from which it appeared that he carried two distinguished passengers, Albert Gallatin and James A. Bayard, Envoys Extraordinary to Russia. The passport duly viséed, the *Neptune* resumed her course out into the open sea, by grace of the British navy.

One of these envoys watched the coast disappear in the haze of evening with mingled feelings of regret and relief. For twelve weary years Gallatin had labored disinterestedly for the land of his adoption and now he was recrossing the ocean to

the home of his ancestors with the taunts of his enemies ringing in his ears. Would the Federalists never forget that he was a "foreigner"? He reflected with a sad, ironic smile that as a "foreigner with a French accent" he would have distinct advantages in the world of European diplomacy upon which he was entering. He counted many distinguished personages among his friends, from Madame de Staël to Alexander Baring of the famous London banking house. Unlike many native Americans he did not need to learn the ways of European courts, because he was to the manner born: he had no provincial habits which he must slough off or conceal. Also he knew himself and the happy qualities with which Nature had endowed him — patience, philosophic composure, unfailing good humor. All these qualities were to be laid under heavy requisition in the work ahead of him.

James Bayard, Gallatin's fellow passenger, had never been taunted as a foreigner, because several generations had intervened since the first of his family had come to New Amsterdam with Peter Stuyvesant. Nothing but his name could ever suggest that he was not of that stock commonly referred to as native American. Bayard had graduated at Princeton, studied law in Philadelphia, and



had just opened a law office in Wilmington when he was elected to represent Delaware in Congress. As the sole representative of his State in the House of Representatives and as a Federalist, he had exerted a powerful influence in the disputed election of 1800, and he was credited with having finally made possible the election of Jefferson over Burr. Subsequently he was sent to the Senate, where he was serving when he was asked by President Madison to accompany Gallatin on this mission to the court of the Czar. Granting that a Federalist must be selected, Gallatin could not have found a colleague more to his liking, for Bayard was a good companion and perhaps the least partisan of the Federalist leaders.

It was midsummer when the *Neptune* dropped anchor in the harbor of Kronstadt. There Gallatin and Bayard were joined by John Quincy Adams, Minister to Russia, who had been appointed the third member of the commission. Here was a pure-blooded American by all the accepted canons. John Quincy Adams was the son of his father and gloried secretly in his lineage: a Puritan of the Puritans in his outlook upon human life and destiny. Something of the rigid quality of rock-bound New England entered into his composition. He was a

foe to all compromise — even with himself; to him Duty was the stern daughter of the voice of God, who admonished him daily and hourly of his obligations. No character in American public life has unbosomed himself so completely as this son of Massachusetts in the pages of his diary. There are no half tones in the pictures which he has drawn of himself, no winsome graces of mind or heart, only the rigid outlines of a soul buffeted by Destiny. Gallatin — the urbane, cosmopolitan Gallatin — must have derived much quiet amusement from his association with this robust New Englander who took himself so seriously. Two natures could not have been more unlike, yet the superior flexibility of Gallatin's temperament made their association not only possible but exceedingly profitable. We may not call their intimacy a friendship — Adams had few, if any friendships; but it contained the essential foundation for friendship — complete mutual confidence.

Adams brought disheartening news to the travel-weary passengers on the *Neptune*: England had declined the offer of mediation. Yes; he had the information from the lips of Count Roumanzoff, the Chancellor and Minister of Foreign Affairs. Apparently, said Adams with pursed lips, England

regarded the differences with America as a sort of family quarrel in which it would not allow an outside neutral nation to interfere. Roumanzoff, however, had renewed the offer of mediation. What the motives of the Count were, he would not presume to say: Russian diplomacy was unfathomable.

The American commissioners were in a most embarrassing position. Courtesy required that they should make no move until they knew what response the second offer of mediation would evoke. The Czar was their only friend in all Europe, so far as they knew, and they were none too sure of him. They were condemned to anxious inactivity, while in middle Europe the fortunes of the Czar rose and fell. In August the combined armies of Russia, Austria, and Prussia were beaten by the fresh levies of Napoleon; in September, the fighting favored the allies; in October, Napoleon was brought to bay on the plains of Leipzig. Yet the imminent fall of the Napoleonic Empire only deepened the anxiety of the forlorn American envoys, for it was likely to multiply the difficulties of securing reasonable terms from his conqueror.

At the same time with news of the Battle of Leipzig came letters from home which informed Gallatin that his nomination as envoy had been

rejected by the Senate. This was the last straw. To remain inactive as an envoy was bad enough; to stay on unaccredited seemed impossible. He determined to take advantage of a hint dropped by his friend Baring that the British Ministry, while declining mediation, was not unwilling to treat directly with the American commissioners. He would go to London in an unofficial capacity and smooth the way to negotiations. But Adams and Bayard demurred and persuaded him to defer his departure. A month later came assurances that Lord Castlereagh had offered to negotiate with the Americans either at London or at Gothenburg.

Late in January, 1814, Gallatin and Bayard set off for Amsterdam: the one to bide his chance to visit London, the other to await further instructions. There they learned that in response to Castlereagh's overtures, the President had appointed a new commission, on which Gallatin's name did not appear. Notwithstanding this disappointment, Gallatin secured the desired permission to visit London through the friendly offices of Alexander Baring. Hardly had the Americans established themselves in London when word came that the two new commissioners, Henry Clay and Jonathan Russell, had landed at Gothenburg bearing a

commission for Gallatin. It seems that Gallatin was believed to be on his way home and had therefore been left off the commission; on learning of his whereabouts, the President had immediately added his name. So it happened that Gallatin stood last on the list when every consideration dictated his choice as head of the commission. The incident illustrates the difficulties that beset communication one hundred years ago. Diplomacy was a game of chance in which wind and waves often turned the score. Here were five American envoys duly accredited, one keeping his stern vigil in Russia, two on the coast of Sweden, and two in hostile London. Where would they meet? With whom were they to negotiate?

After vexatious delays Ghent was fixed upon as the place where peace negotiations should begin, and there the Americans rendezvoused during the first week in July. Further delay followed, for in spite of the assurances of Lord Castlereagh the British representatives did not make their appearance for a month. Meantime the American commissioners made themselves at home among the hospitable Flemish townspeople, with whom they became prime favorites. In the concert halls they were always greeted with enthusiasm. The musicians

soon discovered that British tunes were not in favor and endeavored to learn some American airs. Had the Americans no national airs of their own, they asked. "Oh, yes!" they were assured. "There was *Hail Columbia*." Would not one of the gentlemen be good enough to play or sing it? An embarrassing request, for musical talent was not conspicuous in the delegation; but Peter, Gallatin's black servant, rose to the occasion. He whistled the air; and then one of the attachés scraped out the melody on a fiddle, so that the quick-witted orchestra speedily composed *l'air national des Américains à grand orchestre*, and thereafter always played it as a counterbalance to *God save the King*.

The diversions of Ghent, however, were not numerous, and time hung heavy on the hands of the Americans while they waited for the British commissioners. "We dine together at four," Adams records, "and sit usually at table until six. We then disperse to our several amusements and avocations." Clay preferred cards or billiards and the mild excitement of rather high stakes. Gallatin and his young son James preferred the theater; and all but Adams became intimately acquainted with the members of a French troupe of players whom Adams describes as the worst he ever saw.

As for Adams himself, his diversion was a solitary walk of two or three hours, and then to bed.

On the 6th of August the British commissioners arrived in Ghent — Admiral Lord Gambier, Henry Goulburn, Esq., and Dr. William Adams. They were not an impressive trio. Gambier was an elderly man whom a writer in the *Morning Chronicle* described as a man “who slumbered for some time as a Junior Lord of Admiralty; who sung psalms, said prayers, and assisted in the burning of Copenhagen, for which he was made a lord.” Goulburn was a young man who had served as an under-secretary of state. Adams was a doctor of laws who was expected perhaps to assist negotiations by his legal lore. Gallatin described them not unfairly as “men who have not made any mark . . . puppets of Lords Castlereagh and Liverpool.” Perhaps, in justification of this choice of representatives, it should be said that the best diplomatic talent had been drafted into service at Vienna and that the British Ministry expected in this smaller conference to keep the threads of diplomacy in its own hands.

The first meeting of the negotiators was amicable enough. The Americans found their opponents



courteous and well-bred; and both sides evinced a desire to avoid in word and manner, as Bayard put it, "everything of an inflammable nature." Throughout this memorable meeting at Ghent, indeed, even when difficult situations arose and nerves became taut, personal relations continued friendly. "We still keep personally upon eating and drinking terms with them," Adams wrote at a tense moment. Speaking for his superiors and his colleagues, Admiral Gambier assured the Americans of their earnest desire to end hostilities on terms honorable to both parties. Adams replied that he and his associates reciprocated this sentiment. And then, without further formalities, Goulburn stated in blunt and business-like fashion the matters on which they had been instructed: impressment, fisheries, boundaries, the pacification of the Indians, and the demarkation of an Indian territory. The last was to be regarded as a *sine qua non* for the conclusion of any treaty. Would the Americans be good enough to state the purport of their instructions?

The American commissioners seem to have been startled out of their composure by this *sine qua non*. They had no instructions on this latter point nor on the fisheries; they could only ask for a more



specific statement. What had His Majesty's Government in mind when it referred to an Indian territory? With evident reluctance the British commissioners admitted that the proposed Indian territory was to serve as a buffer state between the United States and Canada. Pressed for more details, they intimated that this area thus neutralized might include the entire Northwest.

A second conference only served to show the want of any common basis for negotiation. The Americans had come to Ghent to settle two outstanding problems — blockades and indemnities for attacks on neutral commerce — and to insist on the abandonment of impressments as a *sine qua non*. Both commissions then agreed to appeal to their respective Governments for further instructions. Within a week, Lord Castlereagh sent precise instructions which confirmed the worst fears of the Americans. The Indian boundary line was to follow the line of the Treaty of Greenville and beyond it neither nation was to acquire land. The United States was asked, in short, to set apart for the Indians in perpetuity an area which comprised the present States of Michigan, Wisconsin, and Illinois, four-fifths of Indiana, and a third of Ohio. But, remonstrated Gallatin, this area included States

and Territories settled by more than a hundred thousand American citizens. What was to be done with them? "They must look after themselves," was the blunt answer.

In comparison with this astounding proposal, Lord Castlereagh's further suggestion of a "rectification" of the frontier by the cession of Fort Niagara and Sackett's Harbor and by the exclusion of the Americans from the Lakes, seemed of little importance. The purpose of His Majesty's Government, the commissioners hastened to add, was not aggrandizement but the protection of the North American provinces. In view of the avowed aim of the United States to conquer Canada, the control of the Lakes must rest with Great Britain. Indeed, taking the weakness of Canada into account, His Majesty's Government might have reasonably demanded the cession of the lands adjacent to the Lakes; and should these moderate terms not be accepted, His Majesty's Government would feel itself at liberty to enlarge its demands, if the war continued to favor British arms. The American commissioners asked if these proposals relating to the control of the Lakes were also a *sine qua non*. "We have given you one *sine qua non* already," was the reply, "and

we should suppose one *sine qua non* at a time was enough."

The Americans returned to their hotel of one mind: they could view the proposals just made in no other light than as a deliberate attempt to dismember the United States. They could differ only as to the form in which they should couch their positive rejection. As titular head of the commission, Adams set promptly to work upon a draft of an answer which he soon set before his colleagues. At once all appearance of unanimity vanished. To the enemy they could present a united front; in the privacy of their apartment, they were five head-strong men. They promptly fell upon Adams's draft tooth and nail. Adams described the scene with pardonable resentment:

Mr. Gallatin is for striking out any expression that may be offensive to the feelings of the adverse party. Mr. Clay is displeased with figurative language, which he thinks improper for a state paper. Mr. Russell, agreeing in the objections of the two other gentlemen, will be further for amending the construction of every sentence; and Mr. Bayard, even when agreeing to say precisely the same thing, chooses to say it only in his own language.

Sharp encounters took place between Adams and Clay. "You *dare* not," shouted Clay in a passion

on one occasion, "you *cannot*, you *shall* not insinuate that there has been a cabal of three members against you!" "Gentlemen! Gentlemen!" Gallatin would expostulate with a twinkle in his eye, "We must remain united or we will fail." It was his good temper and tact that saved this and many similar situations. When Bayard had essayed a draft of his own and had failed to win support, it was Gallatin who took up Adams's draft and put it into acceptable form. On the third day, after hours of "sifting, erasing, patching, and amending, until we were all wearied, though none of us satisfied," Gallatin's revision was accepted. From this moment, Gallatin's virtual leadership was unquestioned.

The American note of the 24th of August was a vigorous but even-tempered protest against the British demands as contrary to precedent and dishonorable to the United States. The American States would never consent "to abandon territory and a portion of their citizens, to admit a foreign interference in their domestic concerns, and to cease to exercise their natural rights on their own shores and in their own waters." "A treaty concluded on such terms would be but an armistice." But after the note had been prepared and

dispatched, profound discouragement reigned in the American hotel. Even Gallatin, usually hopeful and philosophically serene, grew despondent. "Our negotiations may be considered at an end," he wrote to Monroe; "Great Britain wants war in order to cripple us. She wants aggrandizement at our expense. . . . I do not expect to be longer than three weeks in Europe." The commissioners notified their landlord that they would give up their quarters on the 1st of October; yet they lingered on week after week, waiting for the word which would close negotiations and send them home.

Meantime the British Ministry was quite as little pleased at the prospect. It would not do to let the impression go abroad that Great Britain was prepared to continue the war for territorial gains. If a rupture of the negotiations must come, Lord Castlereagh preferred to let the Americans shoulder the responsibility. He therefore instructed Gambier not to insist on the independent Indian territory and the control of the Lakes. These points were no longer to be "ultimata" but only matters for discussion. The British commissioners were to insist, however, on articles providing for the pacification of the Indians.

Should the Americans yield this *sine qua non*,

now that the first had been withdrawn? Adams thought not, decidedly not; he would rather break off negotiations than admit the right of Great Britain to interfere with the Indians dwelling within the limits of the United States. Gallatin remarked that after all it was a very small point to insist on, when a slight concession would win much more important points. "Then, said I [Adams], with a movement of impatience and an angry tone, it is a good point to admit the British as the sovereigns and protectors of our Indians? Gallatin's face brightened, and he said in a tone of perfect good-humor, 'That's a non-sequitur.' This turned the edge of the argument into jocularly. I laughed, and insisted that it was a sequitur, and the conversation easily changed to another point." Gallatin had his way with the rest of the commission and drafted the note of the 26th of September, which, while refusing to recognize the Indians as sovereign nations in the treaty, proposed a stipulation that would leave them in possession of their former lands and rights. This solution of a perplexing problem was finally accepted after another exchange of notes and another earnest discussion at the American hotel, where Gallatin again poured oil on the troubled waters. Concession

begat concession. New instructions from President Madison now permitted the commissioners to drop the demand for the abolition of impressments and blockades; and, with these difficult matters swept away, the path to peace was much easier to travel.

Such was the outlook for peace when news reached Ghent of the humiliating rout at Bladensburg. The British newspapers were full of jubilant comments; the five crestfallen American envoys took what cold comfort they could out of the very general condemnation of the burning of the Capitol. Then, on the heels of this intelligence, came rumors that the British invasion of New York had failed and that Prevost's army was in full retreat to Canada. The Americans could hardly grasp the full significance of this British reversal: it was too good to be true. But true it was, and their spirits rebounded.

It was at this juncture that the British commissioners presented a note, on the 21st of October, which for the first time went to the heart of the negotiations. War had been waged; territory had been overrun; conquests had been made — not the anticipated conquests on either side, to be sure, but conquests nevertheless. These were the plain



facts. Now the practical question was this: Was the treaty to be drafted on the basis of the existing state of possession or on the basis of the status before the war? The British note stated their case in plain unvarnished fashion; it insisted on the *status uti possidetis* — the possession of territory won by arms.

In the minds of the Americans, buoyed up by the victory at Plattsburg, there was not the shadow of doubt as to what their answer should be; they declined for an instant to consider any other basis for peace than the restoration of gains on both sides. Their note was prompt, emphatic, even blunt, and it nearly shattered the nerves of the gentlemen in Downing Street. Had these stiff-necked Yankees no sense? Could they not perceive the studied moderation of the terms proposed — an island or two and a small strip of Maine — when half of Maine and the south bank of the St. Lawrence from Plattsburg to Sackett's Harbor might have been demanded as the price of peace?

The prospect of another year of war simply to secure a frontier which nine out of ten Englishmen could not have identified was most disquieting, especially in view of the prodigious cost of military operations in North America. The Ministry was



both hot and cold. At one moment it favored continued war; at another it shrank from the consequences; and in the end it confessed its own want of decision by appealing to the Duke of Wellington and trying to shift the responsibility to his broad shoulders. Would the Duke take command of the forces in Canada? He should be invested with full diplomatic and military powers to bring the war to an honorable conclusion.

The reply of the Iron Duke gave the Ministry another shock. He would go to America, but he did not promise himself much success there, and he was reluctant to leave Europe at this critical time. To speak frankly, he had no high opinion of the diplomatic game which the Ministry was playing at Ghent. "I confess," said he, "that I think you have no right from the state of the war to demand any concession from America. . . . You have not been able to carry it into the enemy's territory, notwithstanding your military success, and now undoubted military superiority, and have not even cleared your own territory on the point of attack. You cannot on any principle of equality in negotiation claim a cession of territory excepting in exchange for other advantages which you have in your power. . . . Then if this reasoning be

true, why stipulate for the *uti possidetis*? You can get no territory; indeed, the state of your military operations, however creditable, does not entitle you to demand any."

As Lord Liverpool perused this dispatch, the will to conquer oozed away. "I think we have determined," he wrote a few days later to Castle-reagh, "if all other points can be satisfactorily settled, not to continue the war for the purpose of obtaining or securing any acquisition of territory." He set forth his reasons for this decision succinctly: the unsatisfactory state of the negotiations at Vienna, the alarming condition of France, the deplorable financial outlook in England. But Lord Liverpool omitted to mention a still more potent factor in his calculations — the growing impatience of the country. The American war had ceased to be popular; it had become the graveyard of military reputations; it promised no glory to either sailor or soldier. Now that the correspondence of the negotiators at Ghent was made public, the reading public might very easily draw the conclusion that the Ministry was prolonging the war by setting up pretensions which it could not sustain. No Ministry could afford to continue a war out of mere stubbornness.

Meantime, wholly in the dark as to the forces which were working in their favor, the American commissioners set to work upon a draft of a treaty which should be their answer to the British offer of peace on the basis of *uti possidetis*. Almost at once dissensions occurred. Protracted negotiations and enforced idleness had set their nerves on edge, and old personal and sectional differences appeared. The two matters which caused most trouble were the fisheries and the navigation of the Mississippi. Adams could not forget how stubbornly his father had fought for that article in the treaty of 1783 which had conceded to New England fishermen, as a natural right, freedom to fish in British waters. To a certain extent this concession had been offset by yielding to the British the right of navigation of the Mississippi, but the latter right seemed unimportant in the days when the Alleghanies marked the limit of western settlement. In the quarter of a century which had elapsed, however, the West had come into its own. It was now a powerful section with an intensely alert consciousness of its rights and wrongs; and among its rights it counted the exclusive control of the Father of Waters. Feeling himself as much the champion of Western interests as Adams did of New England

fisheries, Clay refused indignantly to consent to a renewal of the treaty provisions of 1783. But when the matter came to a vote, he found himself with Russell in a minority. Very reluctantly he then agreed to Gallatin's proposal, to insert in a note, rather than in the draft itself, a paragraph to the effect that the commissioners were not instructed to discuss the rights hitherto enjoyed in the fisheries, since no further stipulation was deemed necessary to entitle them to rights which were recognized by the treaty of 1783.

When the British reply to the American project was read, Adams noted with quiet satisfaction that the reservation as to the fisheries was passed over in silence — silence, he thought, gave consent — but Clay flew into a towering passion when he learned that the old right of navigating the Mississippi was reasserted. Adams was prepared to accept the British proposals; Clay refused point blank; and Gallatin sided this time with Clay. Could a compromise be effected between these stubborn representatives of East and West? Gallatin tried once more. Why not accept the British right of navigation — surely an unimportant point after all — and ask for an express affirmation of fishery rights? Clay replied hotly that if they were going to

sacrifice the West to Massachusetts, he would not sign the treaty. With infinite patience Gallatin continued to play the rôle of peacemaker and finally brought both these self-willed men to agree to offer a renewal of both rights.

Instead of accepting this eminently fair adjustment, the British representatives proposed that the two disputed rights be left to future negotiation. The suggestion caused another explosion in the ranks of the Americans. Adams would not admit even by implication that the rights for which his sire fought could be forfeited by war and become the subject of negotiation. But all save Adams were ready to yield. Again Gallatin came to the rescue. He penned a note rejecting the British offer, because it seemed to imply the abandonment of a right; but in turn he offered to omit in the treaty all reference to the fisheries and the Mississippi or to include a general reference to further negotiation of all matters still in dispute, in such a way as not to relinquish any rights. To this solution of the difficulty all agreed, though Adams was still torn by doubts and Clay believed that the treaty was bound to be "damned bad" anyway.

An anxious week of waiting followed. On the 22d of December came the British reply — a

grudging acceptance of Gallatin's first proposal to omit all reference to the fisheries and the Mississippi. Two days later the treaty was signed in the refectory of the Carthusian monastery where the British commissioners were quartered. Let the tired seventeen-year-old boy who had been his father's scribe through these long weary months describe the events of Christmas Day, 1814. "The British delegates very civilly asked us to dinner," wrote James Gallatin in his diary. "The roast beef and plum pudding was from England, and everybody drank everybody else's health. The band played first *God Save the King*, to the toast of the King, and *Yankee Doodle*, to the toast of the President. Congratulations on all sides and a general atmosphere of serenity; it was a scene to be remembered. God grant there may be always peace between the two nations. I never saw father so cheerful; he was in high spirits, and his witty conversation was much appreciated."<sup>1</sup>

Peace! That was the outstanding achievement of the American commissioners at Ghent. Measured by the purposes of the war-hawks of 1812, measured by the more temperate purposes of

<sup>1</sup> *A Great Peace Maker: The Dairy of James Gallatin* (1914), p. 36.

President Madison, the Treaty of Ghent was a confession of national weakness and humiliating failure. Clay, whose voice had been loudest for war and whose kindling fancy had pictured American armies dictating terms of surrender at Quebec, set his signature to a document which redressed not a single grievance and added not a foot of territory to the United States. Adams, who had denounced Great Britain for the crime of "man-stealing," accepted a treaty of peace which contained not a syllable about impressment. President Madison, who had reluctantly accepted war as the last means of escape from the blockade of American ports and the ruin of neutral trade, recommended the ratification of a convention which did not so much as mention maritime questions and the rights of neutrals.

Peace — and nothing more? Much more, indeed, than appears in rubrics on parchment. The Treaty of Ghent must be interpreted in the light of more than a hundred years of peace between the two great branches of the English-speaking race. More conscious of their differences than anything else, no doubt, these eight peacemakers at Ghent nevertheless spoke a common tongue and shared a common English trait: they laid firm hold on realities.

Like practical men they faced the year 1815 and not 1812. In a pacified Europe rid of the Corsican, questions of maritime practice seemed dead issues. Let the dead past bury its dead! To remove possible causes of future controversy seemed wiser statesmanship than to rake over the embers of quarrels which might never be rekindled. So it was that in prosaic articles they provided for three commissions to arbitrate boundary controversies at critical points in the far-flung frontier between Canada and the United States, and thus laid the foundations of an international accord which has survived a hundred years.



## CHAPTER XIII

### SPANISH DERELICTS IN THE NEW WORLD

IT fell to the last, and perhaps least talented, President of the Virginia Dynasty to consummate the work of Jefferson and Madison by a final settlement with Spain which left the United States in possession of the Floridas. In the diplomatic service James Monroe had exhibited none of those qualities which warranted the expectation that he would succeed where his predecessors had failed. On his missions to England and Spain, indeed, he had been singularly inept, but he had learned much in the rude school of experience, and he now brought to his new duties discretion, sobriety, and poise. He was what the common people held him to be — a faithful public servant, deeply and sincerely republican, earnestly desirous to serve the country which he loved.

The circumstances of Monroe's election pledged him to a truly national policy. He had received

the electoral votes of all but three States.<sup>1</sup> He was now President of an undivided country, not merely a Virginian fortuitously elevated to the chief magistracy and regarded as alien in sympathy to the North and East. Any doubts on this point were dispelled by the popular demonstrations which greeted him on his tour through Federalist strongholds in the Northeast. "I have seen enough," he wrote in grateful recollection, "to satisfy me that the great mass of our fellow-citizens in the Eastern States are as firmly attached to the union and republican government as I have always believed or could desire them to be." The newspapers which followed his progress from day to day coined the phrase, "era of good feeling," which has passed current ever since as a characterization of his administration.

It was in this admirable temper and with this broad national outlook that Monroe chose his advisers and heads of departments. He was well aware of the common belief that his predecessors had appointed Virginians to the Secretaryship of State in order to prepare the way for their succession to the Presidency. He was determined,

<sup>1</sup> Monroe received 183 electoral votes and Rufus King, 34—the votes of Massachusetts, Connecticut, and Delaware.

therefore, to avert the suspicion of sectional bias by selecting some one from the Eastern States, rather than from the South or from the West, hitherto so closely allied to the South. His choice fell upon John Quincy Adams, "who by his age, long experience in our foreign affairs, and adoption into the Republican party," he assured Jefferson, "seems to have superior pretensions." It was an excellent appointment from every point of view but one. Monroe had overlooked — and the circumstance did him infinite credit — the exigencies of politics and passed over an individual whose vaulting ambition had already made him an aspirant to the Presidency. Henry Clay was grievously disappointed and henceforward sulked in his tent, refusing the Secretaryship of War which the President tendered. Eventually the brilliant young John C. Calhoun took this post. This South Carolinian was in the prime of life, full of fire and dash, ardently patriotic, and nationally-minded to an unusual degree. Of William H. Crawford of Georgia, who retained the Secretaryship of the Treasury, little need be said except that he also was a presidential aspirant who saw things always from the angle of political expediency. Benjamin W. Crowninshield as Secretary of the Navy and William Wirt

as Attorney-General completed the circle of the President's intimate advisers.

The new Secretary of State had not been in office many weeks before he received a morning call from Don Luis de Onis, the Spanish Minister, who was laboring under ill-disguised excitement. It appeared that his house in Washington had been repeatedly "insulted" of late — windows broken, lamps in front of the house smashed, and one night a dead fowl tied to his bell-rope. This last piece of vandalism had been too much for his equanimity. He held it a gross insult to his sovereign and the Spanish monarchy, importing that they were of no more consequence than a dead old hen! Adams, though considerably amused, endeavored to smooth the ruffled pride of the chevalier by suggesting that these were probably only the tricks of some mischievous boys; but De Onis was not easily appeased. Indeed, as Adams was himself soon to learn, the American public did regard the Spanish monarchy as a dead old hen, and took no pains to disguise its contempt. Adams had yet to learn the long train of circumstances which made Spanish relations the most delicate and difficult of all the diplomatic problems in his office.

With his wonted industry, Adams soon made

himself master of the facts relating to Spanish diplomacy. For the moment interest centered on East Florida. Carefully unraveling the tangled skein of events, Adams followed the thread which led back to President Madison's secret message to Congress of January 3, 1811, which was indeed one of the landmarks in American policy. Madison had recommended a declaration "that the United States could not see without serious inquietude any part of a neighboring territory [like East Florida] in which they have in different respects so deep and so just a concern pass from the hands of Spain into those of any other foreign power." To prevent the possible subversion of Spanish authority in East Florida and the occupation of the province by a foreign power — Great Britain was, of course, the power the President had in mind — he had urged Congress to authorize him to take temporary possession "in pursuance of arrangements which may be desired by the Spanish authorities." Congress had responded with alacrity and empowered the President to occupy East Florida in case the local authorities should consent or a foreign power should attempt to occupy it. With equal dispatch the President had sent two agents, General George Matthews and Colonel

John McKee, on one of the strangest missions in the border history of the United States.

East Florida — Adams found, pursuing his inquiries into the archives of the department — included the two important ports of entry, Pensacola on the Gulf and Fernandina on Amelia Island, at the mouth of the St. Mary's River. The island had long been a notorious resort for smugglers. Hither had come British and American vessels with cargoes of merchandise and slaves, which found their way in mysterious fashion to consignees within the States. A Spanish garrison of ten men was the sole custodian of law and order on the island. Up and down the river was scattered a lawless population of freebooters, who were equally ready to raid a border plantation or to raise the Jolly Roger on some piratical cruise. To this No Man's Land — fertile recruiting ground for all manner of filibustering expeditions — General Matthews and Colonel McKee had betaken themselves in the spring of 1811, bearing some explicit instructions from President Madison but also some very pronounced convictions as to what they were expected to accomplish. Matthews, at least, understood that the President wished a revolution after the West Florida model. He assured the Administration —

Adams read the precious missive in the files of his office — that he could do the trick. Only let the Government consign two hundred stand of arms and fifty horsemen's swords to the commander at St. Mary's, and he would guarantee to put the revolution through without committing the United States in any way.

The melodrama had been staged for the following spring (1812). Some two hundred "patriots" recruited from the border people gathered near St. Mary's with souls yearning for freedom; and while American gunboats took a menacing position, this force of insurgents had landed on Amelia Island and summoned the Spanish commandant to surrender. Not willing to spoil the scene by vulgar resistance, the commandant capitulated and marched out his garrison, ten strong, with all the honors of war. The Spanish flag had been hauled down to give place to the flag of the insurgents, bearing the inspiring motto *Salus populi — suprema lex*. Then General Matthews with a squad of regular United States troops had crossed the river and taken possession. Only the benediction of the Government at Washington was lacking to make the success of his mission complete; but to the general's consternation no approving message came, only



a peremptory dispatch disavowing his acts and revoking his commission.

As Adams reviewed these events, he could see no other alternative for the Government to have pursued at this moment when war with Great Britain was impending. It would have been the height of folly to break openly with Spain. The Administration had indeed instructed its new agent, Governor Mitchell of Georgia, to restore the island to the Spanish commandant and to withdraw his troops, if he could do so without sacrificing the insurgents to the vengeance of the Spaniards. But the forces set in motion by Matthews were not so easily controlled from Washington. Once having resolved to liberate East Florida, the patriots were not disposed to retire at the nod of the Secretary of State. The Spanish commandant was equally obdurate. He would make no promise to spare the insurgents. The Legislature of Georgia, too, had a mind of its own. It resolved that the occupation of East Florida was essential to the safety of the State, whether Congress approved or no; and the Governor, swept along in the current of popular feeling, summoned troops from Savannah to hold the province. Just at this moment had come the news of war with Great Britain; and Governor, State militia, and

patriots had combined in an effort to prevent East Florida from becoming enemy's territory.

Military considerations had also swept the Administration along the same hazardous course. The occupation of the Floridas seemed imperative. The President sought authorization from Congress to occupy and govern both the Floridas until the vexed question of title could be settled by negotiation. Only a part of this programme had carried, for, while Congress was prepared to approve the military occupation of West Florida to the Perdido River, beyond that it would not go; and so with great reluctance the President had ordered the troops to withdraw from Amelia Island. In the spring of the same year (1813) General Wilkinson had occupied West Florida — the only permanent conquest of the war and that, oddly enough, the conquest of a territory owned and held by a power with which the United States was not at war.

Abandoned by the American troops, Amelia Island had become a rendezvous for outlaws from every part of the Americas. Just about the time that Adams was crossing the ocean to take up his duties at the State Department, one of these buccaneers by the name of Gregor MacGregor descended upon the island as "Brigadier General of

the Armies of the United Provinces of New Granada and Venezuela, and General-in-chief of that destined to emancipate the provinces of both Floridas, under the commission of the Supreme Government of Mexico and South America." This pirate was soon succeeded by General Aury, who had enjoyed a wild career among the buccaneers of Galveston Bay, where he had posed as military governor under the Republic of Mexico. East Florida in the hands of such desperadoes was a menace to the American border.

Approaching the problem of East Florida without any of the prepossessions of those who had been dealing with Spanish envoys for a score of years, the new Secretary of State was prepared to move directly to his goal without any too great consideration for the feelings of others. His examination of the facts led him to a clean-cut decision: this nest of pirates must be broken up at once. His energy carried President and Cabinet along with him. It was decided to send troops and ships to the St. Mary's and if necessary to invest Fernandina. This demonstration of force sufficed; General Aury departed to conquer new worlds, and Amelia Island was occupied for the second time without bloodshed.

But now, having grasped the nettle firmly, what

was the Administration to do with it? De Onis promptly registered his protest; the opposition in Congress seized upon the incident to worry the President; many of the President's friends thought that he had been precipitate. Monroe, indeed, would have been glad to withdraw the troops now that they had effected their object, but Adams was for holding the island in order to force Spain to terms. With a frankness which lacerated the feelings of De Onis, Adams insisted that the United States had acted strictly on the defensive. The occupation of Amelia Island was not an act of aggression but a necessary measure for the protection of commerce — American commerce, the commerce of other nations, the commerce of Spain itself. Now why not put an end to all friction by ceding the Floridas to the United States? What would Spain take for all her possessions east of the Mississippi, Adams asked. De Onis declined to say. Well, then, Adams pursued, suppose the United States should withdraw from Amelia Island, would Spain guarantee that it should not be occupied again by freebooters? No: De Onis could give no such guarantee, but he would write to the Governor of Havana to ascertain if he would send an adequate garrison to Fernandina.

Adams reported this significant conversation to the President, who was visibly shaken by the conflict of opinions within his political household and not a little alarmed at the possibility of war with Spain. The Secretary of State was coolly taking the measure of his chief. "There is a slowness, want of decision, and a spirit of procrastination in the President," he confided to his diary. He did not add, but the thought was in his mind, that he could sway this President, mold him to his heart's desire. In this first trial of strength the hardier personality won: Monroe sent a message to Congress, on January 13, 1818, announcing his intention to hold East Florida for the present, and the arguments which he used to justify this bold course were precisely those of his Secretary of State.

When Adams suggested that Spain might put an end to all her worries by ceding the Floridas, he was only renewing an offer that Monroe had made while he was still Secretary of State. De Onis had then declared that Spain would never cede territory east of the Mississippi unless the United States would relinquish its claims west of that river. Now, to the new Secretary, De Onis intimated that he was ready to be less exacting. He would be willing to run the line farther west and allow the United

States a large part of what is now the State of Louisiana. Adams made no reply to this tentative proposal but bided his time; and time played into his hands in unexpected ways.

To the Secretary's office, one day in June, 1818, came a letter from De Onis which was a veritable firebrand. De Onis, who was not unnaturally disposed to believe the worst of Americans on the border, had heard that General Andrew Jackson in pursuit of the Seminole Indians had crossed into Florida and captured Pensacola and St. Mark's. He demanded to be informed "in a positive, distinct and explicit manner just what had occurred"; and then, outraged by confirmatory reports and without waiting for Adams's reply, he wrote another angry letter, insisting upon the restitution of the captured forts and the punishment of the American general. Worse tidings followed. Bagot, the British Minister, had heard that Jackson had seized and executed two British subjects on Spanish soil. Would the Secretary of State inform him whether General Jackson had been authorized to take Pensacola, and would the Secretary furnish him with copies of the reports of the courts-martial which had condemned these two subjects of His

Majesty? Adams could only reply that he lacked official information.

By the second week in July, dispatches from General Jackson confirmed the worst insinuations and accusations of De Onis and Bagot. President Monroe was painfully embarrassed. Prompt disavowal of the general's conduct seemed the only way to avert war; but to disavow the acts of this popular idol, the victor of New Orleans, was no light matter. He sought the advice of his Cabinet and was hardly less embarrassed to find all but one convinced that "Old Hickory" had acted contrary to instructions and had committed acts of hostility against Spain. A week of anxious Cabinet sessions followed, in which only one voice was raised in defense of the invasion of Florida. All but Adams feared war, a war which the opposition would surely brand as incited by the President without the consent of Congress. No administration could carry on a war begun in violation of the Constitution, said Calhoun. But, argued Adams, the President may authorize defensive acts of hostility. Jackson had been authorized to cross the frontier, if necessary, in pursuit of the Indians, and all the ensuing deplorable incidents had followed as a necessary consequence of Indian warfare.



The conclusions of the Cabinet were summed up by Adams in a reply to De Onis, on the 23d of July, which must have greatly astonished that diligent defender of Spanish honor. Opening the letter to read, as he confidently expected, a disavowal and an offer of reparation, he found the responsibility for the recent unpleasant incidents fastened upon his own country. He was reminded that by the treaty of 1795 both Governments had contracted to restrain the Indians within their respective borders, so that neither should suffer from hostile raids, and that the Governor of Pensacola, when called upon to break up a stronghold of Indians and fugitive slaves, had acknowledged his obligation but had pleaded his inability to carry out the covenant. Then, and then only, had General Jackson been authorized to cross the border and to put an end to outrages which the Spanish authorities lacked the power to prevent. General Jackson had taken possession of the Spanish forts on his own responsibility when he became convinced of the duplicity of the commandant, who, indeed, had made himself "a partner and accomplice of the hostile Indians and of their foreign instigators." Such conduct on the part of His Majesty's officer justified the President in calling for his punishment. But,

in the meantime, the President was prepared to restore Pensacola, and also St. Mark's, whenever His Majesty should send a force sufficiently strong to hold the Indians under control.

Nor did the Secretary of State moderate his tone or abate his demands when Pizarro, the Spanish Minister of Foreign Affairs, threatened to suspend negotiations with the United States until it should give satisfaction for this "shameful invasion of His Majesty's territory" and for these "acts of barbarity glossed over with the forms of justice." In a dispatch to the American Minister at Madrid, Adams vigorously defended Jackson's conduct from beginning to end. The time had come, said he, when "Spain must immediately make her election either to place a force in Florida adequate at once to the protection of her territory and to the fulfilment of her engagements or cede to the United States a province of which she retains nothing but the nominal possession, but which is in fact a derelict, open to the occupancy of every enemy, civilized or savage, of the United States and serving no other earthly purpose, than as a post of annoyance to them."

This affront to Spanish pride might have ended abruptly a chapter in Spanish-American diplomacy

but for the friendly offices of Hyde de Neuville, the French Minister at Washington, whose Government could not view without alarm the possibility of a rupture between the two countries. It was Neuville who labored through the summer months of this year, first with Adams, then with De Onis, tempering the demands of the one and placating the pride of the other, but never allowing intercourse to drop. Adams was right, and both Neuville and De Onis knew it; the only way to settle outstanding differences was to cede these Spanish derelicts in the New World to the United States.

To bring and keep together these two antithetical personalities, representatives of two opposing political systems, was no small achievement. What De Onis thought of his stubborn opponent may be surmised; what the American thought of the Spaniard need not be left to conjecture. In the pages of his diary Adams painted the portrait of his adversary as he saw him — “cold, calculating, wily, always commanding his temper, proud because he is a Spaniard but supple and cunning, accommodating the tone of his pretensions precisely to the degree of endurance of his opponents, bold and overbearing to the utmost extent to which it is

tolerated, careless of what he asserts or how grossly it is proved to be unfounded.”

The history of the negotiations running through the fall and winter is a succession of propositions and counter-propositions, made formally by the chief participants or tentatively and informally through Neuville. The western boundary of the Louisiana purchase was the chief obstacle to agreement. Each sparred for an advantage; each made extreme claims; and each was persuaded to yield a little here and a little there, slowly narrowing the bounds of the disputed territory. More than once the President and the Cabinet believed that the last concession had been extorted and were prepared to yield on other matters. When the President was prepared, for example, to accept the hundredth meridian and the forty-third parallel, Adams insisted on demanding the one hundred and second and the forty-second; and “after a long and violent struggle,” wrote Adams, “he [De Onis] . . . agreed to take longitude one hundred from the Red River to the Arkansas, and latitude forty-two from the source of the Arkansas to the South Sea.” This was a momentous decision, for the United States acquired thus whatever claim Spain had to the northwest coast

but sacrificed its claim to Texas for the possession of the Floridas.

Vexatious questions still remained to be settled. The spoliation claims which were to have been adjusted by the convention of 1802 were finally left to a commission, the United States agreeing to assume all obligations to an amount not exceeding five million dollars. De Onis demurred at stating this amount in the treaty: he would be blamed for having betrayed the honor of Spain by selling the Floridas for a paltry five millions. To which Adams replied dryly that he ought to boast of his bargain instead of being ashamed of it, since it was notorious that the Floridas had always been a burden to the Spanish exchequer. Negotiations came to a standstill again when Adams insisted that certain royal grants of land in the Floridas should be declared null and void. He feared, and not without reason, that these grants would deprive the United States of the domain which was to be used to pay the indemnities assumed in the treaty. De Onis resented the demand as "offensive to the dignity and imprescriptible rights of the Crown of Spain"; and once again Neuville came to the rescue of the treaty and persuaded both parties to agree to a compromise. On the understanding that the

royal grants in question had been made subsequent to January 24, 1818, Adams agreed that all grants made since that date (when the first proposal was made by His Majesty for the cession of the Floridas) should be declared null and void; and that all grants made before that date should be confirmed.

On the anniversary of Washington's birthday, De Onis and Adams signed the treaty which carried the United States to its natural limits on the southeast. The event seemed to Adams to mark "a great epocha in our history." "It was near one in the morning," he recorded in his diary, "when I closed the day with ejaculations of fervent gratitude to the Giver of all good. It was, perhaps, the most important day of my life. . . . Let no idle and unfounded exultation take possession of my mind, as if I would ascribe to my own foresight or exertions any portion of the event." But misgivings followed hard on these joyous reflections. The treaty had still to be ratified, and the disposition of the Spanish Cortes was uncertain. There was, too, considerable opposition in the Senate. "A watchful eye, a resolute purpose, a calm and patient temper, and a favoring Providence will all be as indispensable for the future as they

have been for the past in the management of this negotiation," Adams reminded himself. He had need of all these qualities in the trying months that followed.



## CHAPTER XIV

### FRAMING AN AMERICAN POLICY

THE decline and fall of the Spanish Empire does not challenge the imagination like the decline and fall of that other Empire with which alone it can be compared, possibly because no Gibbon has chronicled its greatness. Yet its dissolution affected profoundly the history of three continents. While the Floridas were slipping from the grasp of Spain, the provinces to the south were wrenching themselves loose, with protestations which penetrated to European chancelries as well as to American legislative halls. To Czar Alexander and Prince Metternich, sponsors for the Holy Alliance and preservers of the peace of Europe, these declarations of independence contained the same insidious philosophy of revolution which they had pledged themselves everywhere to combat. To simple American minds, the familiar words liberty and independence in the mouths of South American

patriots meant what they had to their own grand-sires, struggling to throw off the shackles of British imperial control. Neither Europe nor America, however, knew the actual conditions in these new-born republics below the equator; and both governed their conduct by their prepossessions.

To the typically American mind of Henry Clay, now untrammelled by any sense of responsibility, for he was a free lance in the House of Representatives once more, the emancipation of South America was a thrilling and sublime spectacle — “the glorious spectacle of eighteen millions of people struggling to burst their chains and to be free.” In a memorable speech in 1818 he had expressed the firm conviction that there could be but one outcome to this struggle. Independent these South American states would be. Equally clear to his mind was their political destiny. Whatever their forms of government, they would be animated by an American feeling and guided by an American policy. “They will obey the laws of the system of the new world, of which they will compose a part, in contradistinction to that of Europe.” To this struggle and to this destiny the United States could not remain indifferent. He would not have the Administration depart from its policy of strict

and impartial neutrality but he would urge the expediency — nay, the justice — of recognizing established governments in Spanish America. Such recognition was not a breach of neutrality, for it did not imply material aid in the wars of liberation but only the moral sympathy of a great free people for their southern brethren.

Contrasted with Clay's glowing enthusiasm, the attitude of the Administration, directed by the prudent Secretary of State, seemed cold, calculating, and rigidly conventional. For his part, Adams could see little resemblance between these revolutions in South America and that of 1776. Certainly it had never been disgraced by such acts of buccaneering and piracy as were of everyday occurrence in South American waters. The United States had contended for civil rights and then for independence; in South America civil rights had been ignored by all parties. He could discern neither unity of cause nor unity of effort in the confused history of recent struggles in South America; and until orderly government was achieved, with due regard to fundamental civil rights, he would not have the United States swerve in the slightest degree from the path of strict neutrality. Mr. Clay, he observed in his diary, had "mounted his

South American great horse . . . to control or overthrow the executive.”

President Monroe, however, was more impressionable, more responsive to popular opinion, and at this moment (as the presidential year approached) more desirous to placate the opposition. He agreed with Adams that the moment had not come when the United States alone might safely recognize the South American states, but he believed that concerted action by the United States and Great Britain might win recognition without wounding the sensibilities of Spain. The time was surely not far distant when Spain would welcome recognition as a relief from an impoverishing and hopeless war. Meanwhile the President coupled professions of neutrality and expressions of sympathy for the revolutionists in every message to Congress.

The temporizing policy of the Administration aroused Clay to another impassioned plea for those southern brethren whose hearts — despite all rebuffs from the Department of State — still turned toward the United States. “We should become the center of a system which would constitute the rallying point of human freedom against the despotism of the Old World. . . . Why not proceed to act on our own responsibility and recognize these

governments as independent, instead of taking the lead of the Holy Alliance in a course which jeopardizes the happiness of unborn millions?" He deprecated this deference to foreign powers. "If Lord Castlereagh says we may recognize, we do; if not, we do not. . . . Our institutions now make us free; but how long shall we continue so, if we mold our opinions on those of Europe? Let us break these commercial and political fetters; let us no longer watch the nod of any European politician; let us become real and true Americans, and place ourselves at the head of the American system."

The question of recognition was thus thrust into the foreground of discussion at a most inopportune time. The Florida treaty had not yet been ratified, for reasons best known to His Majesty the King of Spain, and the new Spanish Minister, General Vivés, had just arrived in the United States to ask for certain explanations. The Administration had every reason at this moment to wish to avoid further causes of irritation to Spanish pride. It is more than probable, indeed, that Clay was not unwilling to embarrass the President and his Secretary of State. He still nursed his personal grudge against the President and he did not disguise his hostility to the treaty. What aroused

his resentment was the sacrifice of Texas for Florida. Florida would have fallen to the United States eventually like ripened fruit, he believed. Why, then, yield an incomparably richer and greater territory for that which was bound to become theirs whenever the American people wished to take it?

But what were the explanations which Vivés demanded? Weary hours spent in conference with the wily Spaniard convinced Adams that the great obstacle to the ratification of the treaty by Spain had been the conviction that the United States was only waiting ratification to recognize the independence of the Spanish colonies. Bitterly did Adams regret the advances which he had made to Great Britain, at the instance of the President, and still more bitterly did he deplore those paragraphs in the President's messages which had expressed an all too ready sympathy with the aims of the insurgents. But regrets availed nothing and the Secretary of State had to put the best face possible on the policy of the Administration. He told Vivés in unmistakable language that the United States could not subscribe to "new engagements as the price of obtaining the ratification of the old." Certainly the United States would not comply with the Spanish demand and pledge itself "to form no

relations with the pretended governments of the revolted provinces of Spain." As for the royal grants which De Onis had agreed to call null and void, if His Majesty insisted upon their validity, perhaps the United States might acquiesce for an equivalent area west of the Sabine River. In some alarm Vivés made haste to say that the King did not insist upon the confirmation of these grants. In the end he professed himself satisfied with Mr. Adams's explanations; he would send a messenger to report to His Majesty and to secure formal authorization to exchange ratifications.

Another long period of suspense followed. The Spanish Cortes did not advise the King to accept the treaty until October; the Senate did not reaffirm its ratification until the following February; and it was two years to a day after the signing of the treaty that Adams and Vivés exchanged formal ratifications. Again Adams confided to the pages of his diary, so that posterity might read, the conviction that the hand of an Overruling Providence was visible in this, the most important event of his life.

If, as many thought, the Administration had delayed recognition of the South American republics in order not to offend Spanish feelings while the



Florida treaty was under consideration, it had now no excuse for further hesitation; yet it was not until March 8, 1822, that President Monroe announced to Congress his belief that the time had come when those provinces of Spain which had declared their independence and were in the enjoyment of it should be formally recognized. On the 19th of June he received the accredited *chargé d'affaires* of the Republic of Colombia.

The problem of recognition was not the only one which the impending dissolution of the Spanish colonial empire left to harass the Secretary of State. Just because Spain had such vast territorial pretensions and held so little by actual occupation on the North American continent, there was danger that these shadowy claims would pass into the hands of aggressive powers with the will and resources to aggrandize themselves. One day in January, 1821, while Adams was awaiting the outcome of his conferences with Vivés, Stratford Canning, the British Minister, was announced at his office. Canning came to protest against what he understood was the decision of the United States to extend its settlements at the mouth of the Columbia River. Adams replied that he knew of no such

determination; but he deemed it very probable that the settlements on the Pacific coast would be increased. Canning expressed rather ill-natured surprise at this statement, for he conceived that such a policy would be a palpable violation of the Convention of 1818. Without replying, Adams rose from his seat to procure a copy of the treaty and then read aloud the parts referring to the joint occupation of the Oregon country. A stormy colloquy followed in which both participants seem to have lost their tempers. Next day Canning returned to the attack, and Adams challenged the British claim to the mouth of the Columbia. "Why," exclaimed Canning, "do you not *know* that we have a claim?" "I do not *know*," said Adams, "what you claim nor what you do not claim. You claim India; you claim Africa; you claim —" "Perhaps," said Canning, "a piece of the moon." "No," replied Adams, "I have not heard that you claim exclusively any part of the moon; but there is not a spot on *this* habitable globe that I could affirm you do not claim; and there is none which you may not claim with as much color of right as you can have to Columbia River or its mouth."

With equal sang-froid, the Secretary of State

met threatened aggression from another quarter. In September of this same year, the Czar issued a ukase claiming the Pacific coast as far south as the fifty-first parallel and declaring Bering Sea closed to the commerce of other nations. Adams promptly refused to recognize these pretensions and declared to Baron de Tuvll, the Russian Minister, "that we should contest the right of Russia to *any* territorial establishment on this continent, and that we should assume distinctly the principle that the American continents are no longer subjects for *any* new European colonial establishments."<sup>1</sup>

Not long after this interview Adams was notified by Baron Tuvll that the Czar, in conformity with the political principles of the allies, had determined in no case whatever to receive any agent from the Government of the Republic of Colombia or from any other government which owed its existence to the recent events in the New World. Adams's first impulse was to pen a reply that would show the inconsistency between these political principles and the unctuous professions of Christian duty which had resounded in the Holy Alliance; but the

<sup>1</sup> Before Adams retired from office, he had the satisfaction of concluding a treaty (1824) with Russia by which the Czar abandoned his claims to exclusive jurisdiction in Bering Sea and agreed to plant no colonies on the Pacific Coast south of 54° 40'.

note which he drafted was, perhaps fortunately, not dispatched until it had been revised by President and Cabinet a month later, under stress of other circumstances.

At still another focal point the interests of the United States ran counter to the covetous desires of European powers. Cuba, the choicest of the provinces of Spain, still remained nominally loyal; but, should the hold of Spain upon this Pearl of the Antilles relax, every maritime power would swoop down upon it. The immediate danger, however, was not that revolution would here as elsewhere sever the province from Spain, leaving it helpless and incapable of self-support, but that France, after invading Spain and restoring the monarchy, would also intervene in the affairs of her provinces. The transfer of Cuba to France by the grateful King was a possibility which haunted the dreams of George Canning at Westminster as well as of John Quincy Adams at Washington. The British Foreign Minister attempted to secure a pledge from France that she would not acquire any Spanish-American territory either by conquest or by treaty, while the Secretary of State instructed the American Minister to Spain not to conceal from the Spanish Government "the repugnance of the

United States to the transfer of the Island of Cuba by Spain to any other power." Canning was equally fearful lest the United States should occupy Cuba and he would have welcomed assurances that it had no designs upon the island. Had he known precisely the attitude of Adams, he would have been still more uneasy, for Adams was perfectly sure that Cuba belonged "by the laws of political as well as of physical gravitation" to the North American continent, though he was not for the present ready to assist the operation of political and physical laws.

Events were inevitably detaching Great Britain from the concert of Europe and putting her in opposition to the policy of intervention, both because of what it meant in Spain and what it might mean when applied to the New World. Knowing that the United States shared these latter apprehensions, George Canning conceived that the two countries might join in a declaration against any project by any European power for subjugating the colonies of South America either on behalf or in the name of Spain. He ventured to ask Richard Rush, American Minister at London, what his government would say to such a proposal. For his part he was quite willing to state publicly that he believed the

recovery of the colonies by Spain to be hopeless; that recognition of their independence was only a question of proper time and circumstance; that Great Britain did not aim at the possession of any of them, though she could not be indifferent to their transfer to any other power. "If," said Canning, "these opinions and feelings are, as I firmly believe them to be, common to your government with ours, why should we hesitate mutually to confide them to each other; and to declare them in the face of the world?"

Why, indeed? To Rush there occurred one good and sufficient answer, which, however, he could not make: he doubted the disinterestedness of Great Britain. He could only reply that he would not feel justified in assuming the responsibility for a joint declaration unless Great Britain would first unequivocally recognize the South American republics; and, when Canning balked at the suggestion, he could only repeat, in as conciliatory manner as possible, his reluctance to enter into any engagement. Not once only but three times Canning repeated his overtures, even urging Rush to write home for powers and instructions.

The dispatches of Rush seemed so important to President Monroe that he sent copies of them to

Jefferson and Madison, with the query — which revealed his own attitude — whether the moment had not arrived when the United States might safely depart from its traditional policy and meet the proposal of the British Government. If there was one principle which ran consistently through the devious foreign policy of Jefferson and Madison, it was that of political isolation from Europe. “Our first and fundamental maxim,” Jefferson wrote in reply, harking back to the old formulas, “should be never to entangle ourselves in the broils of Europe, our second never to suffer Europe to intermeddle with Cis-Atlantic affairs.” He then continued in this wise:

America, North and South, has a set of interests distinct from those of Europe, and peculiarly her own. She should therefore have a system of her own, separate and apart from that of Europe. While the last is laboring to become the domicile of despotism, our endeavor should surely be, to make our hemisphere that of freedom. One nation, most of all, could disturb us in this pursuit; she now offers to lead, aid, and accompany us in it. By acceding to her proposition, we detach her from the band of despots, bring her mighty weight into the scale of free government and emancipate a continent at one stroke which might otherwise linger long in doubt and difficulty. . . . I am clearly of Mr. Canning’s opinion, that it will prevent,



instead of provoking war. With Great Britain withdrawn from their scale and shifted into that of our two continents, all Europe combined would not undertake such a war. . . . Nor is the occasion to be slighted which this proposition offers, of declaring our protest against the atrocious violations of the rights of nations, by the interference of any one in the internal affairs of another, so flagitiously begun by Buonaparte, and now continued by the equally lawless alliance, calling itself Holy.

Madison argued the case with more reserve but arrived at the same conclusion: "There ought not to be any backwardness therefore, I think, in meeting her [England] in the way she has proposed." The dispatches of Rush produced a very different effect, however, upon the Secretary of State, whose temperament fed upon suspicion and who now found plenty of food for thought both in what Rush said and in what he did not say. Obviously Canning was seeking a definite compact with the United States against the designs of the allies, not out of any altruistic motive but for selfish ends. Great Britain, Rush had written bluntly, had as little sympathy with popular rights as it had on the field of Lexington. It was bent on preventing France from making conquests, not on making South America free. Just so, Adams reasoned: Canning

desires to secure from the United States a public pledge "ostensibly against the forcible interference of the Holy Alliance between Spain and South America; but really or especially against the acquisition to the United States themselves of any part of the Spanish-American possessions." By joining with Great Britain we would give her a "substantial and perhaps inconvenient pledge against ourselves, and really obtain nothing in return." He believed that it would be more candid and more dignified to decline Canning's overtures and to avow our principles explicitly to Russia and France. For his part he did not wish the United States "to come in as a cock-boat in the wake of the British man-of-war!"

Thus Adams argued in the sessions of the Cabinet, quite ignorant of the correspondence which had passed between the President and his mentors. Confident of his ability to handle the situation, he asked no more congenial task than to draft replies to Baron Tuyll and to Canning and instructions to the ministers at London, St. Petersburg, and Paris; but he impressed upon Monroe the necessity of making all these communications "part of a combined system of policy and adapted to each other." Not so easily, however, was the President detached

from the influence of the two Virginia oracles. He took sharp exception to the letter which Adams drafted in reply to Baron Tuvill, saying that he desired to refrain from any expressions which would irritate the Czar; and thus turned what was to be an emphatic declaration of principles into what Adams called "the tamest of state papers."

The Secretary's draft of instructions to Rush had also to run the gauntlet of amendment by the President and his Cabinet; but it emerged substantially unaltered in content and purpose. Adams professed to find common ground with Great Britain, while pointing out with much subtlety that if she believed the recovery of the colonies by Spain was really hopeless, she was under moral obligation to recognize them as independent states and to favor only such an adjustment between them and the mother country as was consistent with the fact of independence. The United States was in perfect accord with the principles laid down by Mr. Canning: it desired none of the Spanish possessions for itself but it could not see with indifference any portion of them transferred to any other power. Nor could the United States see with indifference "any attempt by one or more powers of Europe to restore those new states to the crown of Spain, or to deprive

them, in any manner whatever, of the freedom and independence which they have acquired." But, for accomplishing the purposes which the two governments had in common — and here the masterful Secretary of State had his own way — it was advisable *that they should act separately*, each making such representations to the continental allies as circumstances dictated.

Further communications from Baron Tuyll gave Adams the opportunity, which he had once lost, of enunciating the principles underlying American policy. In a masterly paper dated November 27, 1823, he adverted to the declaration of the allied monarchs that they would never compound with revolution but would forcibly interpose to guarantee the tranquillity of civilized states. In such declarations "the President," wrote Adams, "wishes to perceive sentiments, the application of which is limited, and intended in their results to be limited to the affairs of Europe. . . . The United States of America, and their government, could not see with indifference, the forcible interposition of any European Power, other than Spain, either to restore the dominion of Spain over her emancipated Colonies in America, or to establish Monarchical Governments in those Countries, or to transfer

any of the possessions heretofore or yet subject to Spain in the American Hemisphere, to any other European Power."

But so little had the President even yet grasped the wide sweep of the policy which his Secretary of State was framing that, when he read to the Cabinet a first draft of his annual message, he expressed his pointed disapprobation of the invasion of Spain by France and urged an acknowledgment of Greece as an independent nation. This declaration was, as Adams remarked, a call to arms against all Europe. And once again he urged the President to refrain from any utterance which might be construed as a pretext for retaliation by the allies. If they meant to provoke a quarrel with the United States, the administration must meet it and not invite it. "If they intend now to interpose by force, we shall have as much as we can do to prevent them," said he, "without going to bid them defiance in the heart of Europe." "The ground I wish to take," he continued, "is that of earnest remonstrance against the interference of the European powers by force with South America, but to disclaim all interference on our part with Europe; to make an American cause and adhere inflexibly to that." In the end Adams had his way and the

President revised the paragraphs dealing with foreign affairs so as to make them conform to Adams's desires.

No one who reads the message which President Monroe sent to Congress on December 2, 1823, can fail to observe that the paragraphs which have an enduring significance as declarations of policy are anticipated in the masterly state papers of the Secretary of State. Alluding to the differences with Russia in the Pacific Northwest, the President repeated the principle which Adams had stated to Baron Tuvill: "The occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers." And the vital principle of abstention from European affairs and of adherence to a distinctly American system, for which Adams had contended so stubbornly, found memorable expression in the following paragraph:

In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. It is only when

our rights are invaded or seriously menaced that we resent injuries or make preparations for our defense. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments; and to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies and dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.

Later generations have read strange meanings into Monroe's message, and have elevated into a



“doctrine” those declarations of policy which had only an immediate application. With the interpretations and applications of a later day, this book has nothing to do. Suffice it to say that President Monroe and his advisers accomplished their purposes; and the evidence that they were successful is contained in a letter which Richard Rush wrote to the Secretary of State, on December 27, 1823:

But the most decisive blow to all despotick interference with the new States is that which it has received in the President’s Message at the opening of Congress. It was looked for here with extraordinary interest at this juncture, and I have heard that the British packet which left New York the beginning of this month was instructed to wait for it and bring it over with all speed. . . . On its publicity in London . . . the credit of all the Spanish American securities immediately rose, and the question of the final and complete safety of the new States from all European coercion, is now considered as at rest.

## CHAPTER XV

### THE END OF AN ERA

It was in the midst of the diplomatic contest for the Floridas that James Monroe was for the second time elected to the Presidency, with singularly little display of partisanship. This time all the electoral votes but one were cast for him. Of all the Presidents only George Washington has received a unanimous vote; and to Monroe, therefore, belongs the distinction of standing second to the Father of his Country in the vote of electors. The single vote which Monroe failed to get fell to his Secretary of State, John Quincy Adams. It is a circumstance of some interest that the father of the Secretary, old John Adams, so far forgot his Federalist antecedents that he served as Republican elector in Massachusetts and cast his vote for James Monroe. Never since parties emerged in the second administration of Washington had such extraordinary unanimity prevailed.

Across this scene of political harmony, however, the Missouri controversy cast the specter-like shadow of slavery. For the moment, and often in after years, it seemed inevitable that parties would spring into new vigor following sectional lines. All patriots were genuinely alarmed. "This momentous question," wrote Jefferson, "like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union. It is hushed, indeed, for the moment. But this is a reprieve only, not a final sentence."

What Jefferson termed a reprieve was the settlement of the Missouri question by the compromise of 1820. To the demands of the South that Missouri should be admitted into the Union as a slave State, with the constitution of her choice, the North yielded, on condition that the rest of the Louisiana Purchase north of  $36^{\circ} 30'$  should be forever free. Henceforth slaveholders might enter Missouri and the rest of the old province of Louisiana below her southern boundary line, but beyond this line, into the greater Northwest, they might not take their human chattels. To this act of settlement President Monroe gave his assent, for he believed that further controversy would shake the Union to its very foundations.

With the angry criminations and recriminations of North and South ringing in his ears, Jefferson had little faith in the permanency of such a settlement. "A geographical line," said he, "coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper." And Madison, usually optimistic about the future of his beloved country, indulged only the gloomiest forebodings about slavery. Both the ex-Presidents took what comfort they could in projects of emancipation and deportation. Jefferson would have had slaveholders yield up slaves born after a certain date to the guardianship of the State, which would then provide for their removal to Santo Domingo at a proper age. Madison took heart at the prospect opened up by the Colonization Society which he trusted would eventually end "this dreadful calamity" of human slavery. Fortunately for their peace of mind, neither lived to see these frail hopes dashed to pieces.

Signs were not wanting that statesmen of the Virginia school were not to be leaders in the new era which was dawning. On several occasions both Madison and Monroe had shown themselves out-

of touch with the newer currents of national life. Their point of view was that of the epoch which began with the French Revolution and ended with the overthrow of Napoleon and the pacification of Europe. Inevitably foreign affairs had absorbed their best thought. To maintain national independence against foreign aggression had been their constant purpose, whether the menace came from Napoleon's designs upon Louisiana, or from British disregard of neutral rights, or from Spanish helplessness on the frontiers of her Empire. But now, with political and commercial independence assured, a new direction was imparted to national endeavor. America made a volte-face and turned to the setting sun.

During the second quarter of the nineteenth century every ounce of national vitality went into the conquest and settlement of the Mississippi Valley. Once more at peace with the world, Americans set themselves to the solution of the problems which grew out of this vast migration from the Atlantic seaboard to the interior. These were problems of territorial organization, of distribution of public lands, of inland trade, of highways and waterways, of revenue and appropriation — problems that focused in the offices of the Secretaries of

the Treasury and of War. And lurking behind all was the specter of slavery and sectionalism.

To impatient homeseekers who crossed the Alleghanies, it never occurred to question the competence of the Federal Government to meet all their wants. That the Government at Washington should construct and maintain highways, improve and facilitate the navigation of inland waterways, seemed a most reasonable expectation. What else was government for? But these proposed activities did not seem so obviously legitimate to Presidents of the Virginia Dynasty; not so readily could they waive constitutional scruples. Madison felt impelled to veto a bill for constructing roads and canals and improving waterways because he could find nowhere in the Constitution any specific authority for the Federal Government to embark on a policy of internal improvements. His last message to Congress set forth his objections in detail and was designed to be his farewell address. He would rally his party once more around the good old Jeffersonian doctrines. Monroe felt similar doubts when he was presented with a bill to authorize the collection of tolls on the new Cumberland Road. In a veto message of prodigious length he, too, harked back to the original Republican principle of

strict construction of the Constitution. The leadership which the Virginians thus refused to take fell soon to men of more resolute character who would not let the dead hand of legalism stand between them and their hearts' desires.

It is one of the ironies of American history that the settlement of the Mississippi Valley and of the Gulf plains brought acute pecuniary distress to the three great Virginians who had bent all their energies to acquire these vast domains. The lure of virgin soil drew men and women in ever increasing numbers from the seaboard States. Farms that had once sufficed were cast recklessly on the market to bring what they would, while their owners staked their claims on new soil at a dollar and a quarter an acre. Depreciation of land values necessarily followed in States like Virginia; and the three ex-Presidents soon found themselves land-poor. In common with other planters, they had invested their surplus capital in land, only to find themselves unable to market their crops in the trying days of the Embargo and Non-Intercourse Acts. They had suffered heavy losses from the British blockade during the war, and they had not fully recovered from these reverses when the general fall



of prices came in 1819. Believing that they were facing only a temporary condition, they met their difficulties by financial expedients which in the end could only add to their burdens.

A general reluctance to change their manner of life and to practice an intensive agriculture with diversified crops contributed, no doubt, to the general depression of planters in the Old Dominion. Jefferson at Monticello, Madison at Montpelier, and to a lesser extent Monroe at Oak Hill, maintained their old establishments and still dispensed a lavish Southern hospitality, which indeed they could hardly avoid. A former President is forever condemned to be a public character. All kept open house for their friends, and none could bring himself to close his door to strangers, even when curiosity was the sole motive for intrusion. Sorely it must have tried the soul of Mrs. Randolph to find accommodations at Monticello for fifty uninvited and unexpected guests. Mrs. Margaret Bayard Smith, who has left lively descriptions of life at Montpelier, was once one of twenty-three guests. When a friend commented on the circumstance that no less than nine strange horses were feeding in the stables at Montpelier, Madison remarked somewhat grimly that he was delighted with the society

of the owners but could not confess to the same enthusiasm at the presence of their horses.

Both Jefferson and Madison were victims of the indiscretion of others. Madison was obliged to pay the debts of a son of Mrs. Madison by her first marriage and became so financially embarrassed that he was forced to ask President Biddle of the Bank of the United States for a long loan of six thousand dollars — only to suffer the humiliation of a refusal. He had then to part with some of his lands at a great sacrifice, but he retained Montpelier and continued to reside there, though in reduced circumstances, until his death in 1836. At about the same time Jefferson received what he called his *coup de grâce*. He had endorsed a note of twenty thousand dollars for Governor Wilson C. Nicholas and upon his becoming insolvent was held to the full amount of the note. His only assets were his lands which would bring only a fifth of their former price. To sell on these ruinous terms was to impoverish himself and his family. His distress was pathetic. In desperation he applied to the Legislature for permission to sell his property by lottery; but he was spared this last humiliation by the timely aid of friends, who started popular subscriptions to relieve his distress. Monroe was less

fortunate, for he was obliged to sell Oak Hill and to leave Old Virginia forever. He died in New York City on the Fourth of July, 1831.

The latter years of Jefferson's life were cheered by the renewal of his old friendship with John Adams, now in retirement at Quincy. Full of pleasant reminiscence are the letters which passed between them, and full too of allusions to the passing show. Neither had lost all interest in politics, but both viewed events with the quiet contemplation of old men. Jefferson was absorbed to the end in his last great hobby, the university that was slowly taking bodily form four miles away across the valley from Monticello. When bodily infirmities would not permit him to ride so far, he would watch the workmen through a telescope mounted on one of the terraces. "Crippled wrists and fingers make writing slow and laborious," he wrote to Adams. "But while writing to you, I lose the sense of these things in the recollection of ancient times, when youth and health made happiness out of everything. I forget for a while the hoary winter of age, when we can think of nothing but how to keep ourselves warm, and how to get rid of our heavy hours until the friendly hand of death shall rid us of all at once. Against this *tedium vitæ*, however,

I am fortunately mounted on a hobby, which, indeed, I should have better managed some thirty or forty years ago; but whose easy amble is still sufficient to give exercise and amusement to an octogenary rider. This is the establishment of a University." Alluding to certain published letters which revived old controversies, he begged his old friend not to allow his peace of mind to be shaken. "It would be strange indeed, if, at our years, we were to go back an age to hunt up imaginary or forgotten facts, to disturb the repose of affections so sweetening to the evening of our lives."

As the fiftieth anniversary of the Declaration of Independence approached, Jefferson and Adams were besought to take part in the celebration which was to be held in Philadelphia. The infirmities of age rested too heavily upon them to permit their journeying so far; but they consecrated the day anew with their lives. At noon, on the Fourth of July, 1826, while the Liberty Bell was again sounding its old message to the people of Philadelphia, the soul of Thomas Jefferson passed on; and a few hours later John Adams entered into rest, with the name of his old friend upon his lips.



## BIBLIOGRAPHICAL NOTE

### GENERAL WORKS

FIVE well-known historians have written comprehensive works on the period covered by the administrations of Jefferson, Madison, and Monroe: John B. McMaster has stressed the social and economic aspects in *A History of the People of the United States*; James Schouler has dwelt upon the political and constitutional problems in his *History of the United States of America under the Constitution*; Woodrow Wilson has written a *History of the American People* which indeed is less a history than a brilliant essay on history; Hermann von Holst has construed the *Constitutional and Political History of the United States* in terms of the slavery controversy; and Edward Channing has brought forward his painstaking *History of the United States*, touching many phases of national life, to the close of the second war with England. To these general histories should be added *The American Nation*, edited by Albert Bushnell Hart, three volumes of which span the administrations of the three Virginians: E. Channing's *The Jeffersonian System* (1906); K. C. Babcock's *The Rise of American Nationality* (1906); F. J. Turner's *Rise of the New West* (1906).

## CHAPTER I

No historian can approach this epoch without doing homage to Henry Adams, whose *History of the United States*, 9 vols. (1889-1891), is at once a literary performance of extraordinary merit and a treasure-house of information. Skillfully woven into the text is documentary material from foreign archives which Adams, at great expense, had transcribed and translated. Intimate accounts of Washington and its society may be found in the following books: G. Gibbs, *Memoirs of the Administrations of Washington and John Adams*, 2 vols. (1846); Mrs. Margaret Bayard Smith, *The First Forty Years of Washington Society* (1906); Anne H. Wharton, *Social Life in the Early Republic* (1902). *The Life of Thomas Jefferson*, 3 vols. (1858), by Henry S. Randall is rich in authentic information about the life of the great Virginia statesman but it is marred by excessive hero-worship. Interesting side-lights on Jefferson and his entourage are shed by his granddaughter, Sarah N. Randolph, in a volume called *Domestic Life of Thomas Jefferson* (1871).

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PART II  
JOHN MARSHALL AND THE  
CONSTITUTION

A CHRONICLE  
OF THE SUPREME COURT

BY  
EDWARD S. CORWIN

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# JOHN MARSHALL AND THE CONSTITUTION

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## CHAPTER I

### THE ESTABLISHMENT OF THE NATIONAL JUDICIARY

THE monarch of ancient times mingled the functions of priest and judge. It is therefore not altogether surprising that even today a judicial system should be stamped with a certain resemblance to an ecclesiastical hierarchy. If the Church of the Middle Ages was "an army encamped on the soil of Christendom, with its outposts everywhere, subject to the most efficient discipline, animated with a common purpose, every soldier panoplied with inviolability and armed with the tremendous weapons which slew the soul," the same words, slightly varied, may be applied to the Federal Judiciary created by the American Constitution. The Judiciary of the United States, though numerically not

a large body, reaches through its process every part of the nation; its ascendancy is primarily a moral one; it is kept in conformity with final authority by the machinery of appeal; it is "animated with a common purpose"; its members are "panoplied" with what is practically a life tenure of their posts; and it is "armed with the tremendous weapons" which slay legislation. And if the voice of the Church was the voice of God, so the voice of the Court is the voice of the American people as this is recorded in the Constitution.

The Hildebrand of American constitutionalism is John Marshall. The contest carried on by the greatest of the Chief Justices for the principles to-day associated with his name is very like that waged by the greatest of the Popes for the supremacy of the Papacy. Both fought with intellectual weapons. Both addressed their appeal to the minds and hearts of men. Both died before the triumph of their respective causes and amid circumstances of great discouragement. Both worked through and for great institutions which preceded them and which have survived them. And, as the achievements of Hildebrand cannot be justly appreciated without some knowledge of the ecclesiastical system which he did so much to develop, neither can the career of John

Marshall be understood without some knowledge of the organization of the tribunal through which he wrought and whose power he did so much to exalt. The first chapter in the history of John Marshall and his influence upon the laws of the land must therefore inevitably deal with the historical conditions underlying the judicial system of which it is the capstone.

The vital defect of the system of government provided by the soon obsolete Articles of Confederation lay in the fact that it operated not upon the individual citizens of the United States but upon the States in their corporate capacities. As a consequence the prescribed duties of any law passed by Congress in pursuance of powers derived from the Articles of Confederation could not be enforced. Theoretically, perhaps, Congress had the right to coerce the States to perform their duties; at any rate, a Congressional Committee headed by Madison so decided at the very moment (1781) when the Articles were going into effect. But practically such a course of coercion, requiring in the end the exercise of military power, was out of the question. Whence were to come the forces for military operations against recalcitrant States? From sister States which had themselves neglected their

constitutional duties on various occasions? The history of the German Empire has demonstrated that the principle of state coercion is entirely feasible when a single powerful State dominates the rest of the confederation. But the Confederation of 1781 possessed no such giant member; it approximated a union of equals, and in theory it was entirely such.<sup>1</sup>

In the Federal Convention of 1787 the idea of state coercion required little discussion; for the

<sup>1</sup> By the Articles of Confederation Congress itself was made "the last resort of all disputes and differences . . . between two or more States concerning boundary, jurisdiction, or any other cause whatever." It was also authorized to appoint "courts for the trial of piracies and felonies committed on the high seas" and "for receiving and determining finally appeals in all cases of capture." But even before the Articles had gone into operation, Congress had, as early as 1779, established a tribunal for such appeals, the old Court of Appeals in Cases of Capture. Thus at the very outset, and at a time when the doctrine of state sovereignty was dominant, the practice of appeals from state courts to a supreme national tribunal was employed, albeit within a restricted sphere. Yet it is less easy to admit that the Court of Appeals was, as has been contended by one distinguished authority, "not simply the predecessor but one of the origins of the Supreme Court of the United States." The Supreme Court is the creation of the Constitution itself; it is the final interpreter of the law in every field of national power; and its decrees are carried into effect by the force and authority of the Government of which it is one of the three coördinate branches. That earlier tribunal, the Court of Appeals in Cases of Capture, was, on the other hand, a purely legislative creation; its jurisdiction was confined to a single field, and that of importance only in time of war; and the enforcement of its decisions rested with the state governments.

members were soon convinced that it involved an impracticable, illogical, and unjust principle. The prevailing view was voiced by Oliver Ellsworth before the Connecticut ratifying convention: "We see how necessary for Union is a coercive principle. No man pretends to the contrary. . . . The only question is, shall it be a coercion of law or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come out? . . . A necessary consequence of their principles is a war of the States one against the other. I am for coercion by law, that coercion which acts only upon delinquent individuals." If anything, these words somewhat exaggerate the immunity of the States from direct control by the National Government, for, as James Madison pointed out in the *Federalist*, "in several cases . . . they [the States] must be viewed and proceeded against in their collective capacities." Yet Ellsworth stated correctly the controlling principle of the new government: it was to operate upon individuals through laws interpreted and enforced by its own courts

A Federal Judiciary was provided for in every plan offered on the floor of the Federal Convention. There was also a fairly general agreement among the

members on the question of "judicial independence." Indeed, most of the state constitutions already made the tenure of the principal judges dependent upon their good behavior, though in some cases judges were removable, as in England, upon the joint address of the two Houses of the Legislature. That the Federal judges should be similarly removable by the President upon the application of the Senate and House of Representatives was proposed late in the Convention by Dickinson of Delaware, but the suggestion received the vote of only one State. In the end it was all but unanimously agreed that the Federal judges should be removable only upon conviction following impeachment.

But, while the Convention was in accord on this matter, another question, that of the organization of the new judiciary, evoked the sharpest disagreement among its members. All believed that there must be a national Supreme Court to impress upon the national statutes a construction that should be uniformly binding throughout the country; but they disagreed upon the question whether there should be inferior national courts. Rutledge of South Carolina wanted the state courts to be used as national courts of the first instance

and argued that a right of appeal to the supreme national tribunal would be quite sufficient "to secure the national rights and uniformity of judgment." But Madison pointed out that such an arrangement would cause appeals to be multiplied most oppressively and that, furthermore, it would provide no remedy for improper verdicts resulting from local prejudices. A compromise was reached by leaving the question to the discretion of Congress. The champions of local liberties, however, both at Philadelphia and in the state conventions continued to the end to urge that Congress should utilize the state courts as national tribunals of the first instance. The significance of this plea should be emphasized because the time was to come when the same interest would argue that for the Supreme Court to take appeals from the state courts on any account was a humiliation to the latter and an utter disparagement of State Rights.

Even more important than the relation of the Supreme Court to the judicial systems of the States was the question of its relation to the Constitution as a governing instrument. Though the idea that courts were entitled to pronounce on the constitutionality of legislative acts had received countenance in a few dicta in some of the States and



perhaps in one or two decisions, this idea was still at best in 1787 but the germ of a possible institution. It is not surprising, therefore, that no such doctrine found place in the resolutions of the Virginia plan which came before the Convention. By the sixth resolution of this plan the national legislature was to have the power of negating all state laws which, in its opinion, contravened "the Articles of Union, or any treaty subsisting under the authority of the Union," and by the eighth resolution "a convenient number of the national judiciary" were to be associated with the Executive, "with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final" and to impose a qualified veto in either case.

But, as discussion in the Convention proceeded, three principles obtained clearer and clearer recognition, if not from all its members, certainly from the great majority of them: first, that the Constitution is law, in the sense of being enforceable by courts; secondly, that it is supreme law, with which ordinary legislation must be in harmony to be valid; and thirdly — a principle deducible from the doctrine of the separation of powers — that, while the

function of making new law belongs to the legislative branch of the Government, that of expounding the standing law, of which the Constitution would be part and parcel, belongs to the Judiciary. The final disposition of the question of insuring the conformity of ordinary legislation to the Constitution turned to no small extent on the recognition of these three great principles.

The proposal to endow Congress with the power to negative state legislation having been rejected by the Convention, Luther Martin of Maryland moved that "the legislative acts of the United States made in virtue and in pursuance of the Articles of Union, and all treaties made or ratified under the authority of the United States, shall be the supreme law of the respective States, and the judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding." The motion was agreed to without a dissenting voice and, with some slight changes, became Article VIII of the report of the Committee of Detail of the 7th of August, which in turn became "the linch-pin of the Constitution."<sup>1</sup> Then, on the 27th of August, it was agreed that

<sup>1</sup> Article VI, paragraph 2.

“the jurisdiction of the Supreme Court” should “extend to all cases arising under the laws passed by the Legislature of the United States,” whether, that is, such laws should be in pursuance of the Constitution or not. The foundation was thus laid for the Supreme Court to claim the right to review any state decision challenging on constitutional grounds the validity of any act of Congress. Presently this foundation was broadened by the substitution of the phrase “judicial power of the United States” for the phrase “jurisdiction of the Supreme Court,” and also by the insertion of the words “this Constitution” and “the” before the word “laws” in what ultimately became Article III of the Constitution. The implications of the phraseology of this part of the Constitution are therefore significant:

Section I. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.

Section II. 1. The judicial power shall extend to all cases in law and equity arising under this Constitution,

the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

Such, then, is the verbal basis of the power of the courts, and particularly of the Supreme Court, to review the legislation of any State, with reference to the Constitution, to acts of Congress, or to treaties of the United States. Nor can there be much doubt that the members of the Convention were also substantially agreed that the Supreme Court was endowed with the further right to pass upon the constitutionality of acts of Congress. The available evidence strictly contemporaneous with the framing and ratification of the Constitution shows us seventeen of the fifty-five members of the Convention asserting the existence of this prerogative in unmistakable terms and only three using language that can be construed to the contrary. More striking than that, however, is the fact that

these seventeen names include fully three-fourths of the leaders of the Convention, four of the five members of the Committee of Detail which drafted the Constitution, and four of the five members of the Committee of Style which gave the Constitution its final form. And these were precisely the members who expressed themselves on all the interesting and vital subjects before the Convention, because they were its statesmen and articulate members.<sup>1</sup>

No part of the Constitution has realized the hopes of its framers more brilliantly than has Article III, where the judicial power of the United States is defined and organized, and no part has shown itself to be more adaptable to the developing needs of a growing nation. Nor is the reason obscure: no part came from the hands of the framers in more fragmentary shape or left more to the discretion of Congress and the Court.

Congress is thus placed under constitutional obligation to establish one Supreme Court, but the size of that Court is for Congress itself to determine, as well as whether there shall be any inferior Federal

<sup>1</sup> The entries under the names of these members in the Index to Max Farrand's *Records of the Federal Convention* occupy fully thirty columns, as compared with fewer than half as many columns under the names of all remaining members.

Courts at all. What, it may be asked, is the significance of the word "shall" in Section II? Is it merely permissive or is it mandatory? And, in either event, when does a case arise under the Constitution or the laws of the United States? Here, too, are questions which are left for Congress in the first instance and for the Supreme Court in the last. Further, the Supreme Court is given "original jurisdiction" in certain specified cases and "appellate jurisdiction" in all others — subject, however, to "such exceptions and under such regulations as the Congress shall make." Finally, the whole question of the relation of the national courts to the state judiciaries, though it is elaborately discussed by Alexander Hamilton in the *Federalist*, is left by the Constitution itself to the practically undirected wisdom of Congress, in the exercise of its power to pass "all laws which shall be necessary and proper for carrying into execution"<sup>1</sup> its own powers and those of the other departments of the Government.

Almost the first official act of the Senate of the United States, after it had perfected its own organization, was the appointment of a committee "to bring in a bill for organizing the judiciary of the United States." This committee consisted of eight

<sup>1</sup> Article I, section VIII, 18.

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members, five of whom, including Oliver Ellsworth, its chairman, had been members of the Federal Convention. To Ellsworth is to be credited largely the authorship of the great Judiciary Act of September 24, 1789, the essential features of which still remain after 130 years in full force and effect.

This famous measure created a chief justiceship and five associate justiceships for the Supreme Court; fifteen District Courts, one for each State of the Union and for each of the two Territories, Kentucky and Ohio; and, to stand between these, three Circuit Courts consisting of two Supreme Court justices and the local district judge. The "cases" and "controversies" comprehended by the Act fall into three groups: first, those brought to enforce the national laws and treaties, original jurisdiction of which was assigned to the District Courts; secondly, controversies between citizens of different States<sup>1</sup>; lastly, cases brought originally under a state law and in a State Court but finally coming to involve some claim of right based on the National Constitution, laws, or treaties. For these the twenty-fifth section of the Act provided that,

<sup>1</sup> Where the national jurisdiction was extended to these in the interest of providing an impartial tribunal, it was given to the Circuit Courts.



where the decision of the highest State Court competent under the state law to pass upon the case was adverse to the claim thus set up, an appeal on the issue should lie to the Supreme Court. This twenty-fifth section received the hearty approval of the champions of State Rights, though later on it came to be to them an object of fiercest resentment. In the Senate, as in the Convention, the artillery of these gentlemen was trained upon the proposed inferior Federal Judiciary, which they pictured as a sort of Gargantua ready at any moment "to swallow up the state courts."

The first nominations for the Supreme Court were sent in by Washington two days after he had signed the Judiciary Act. As finally constituted, the original bench consisted of John Jay of New York as Chief Justice, and of John Rutledge of South Carolina, William Cushing of Massachusetts, John Blair of Virginia, James Wilson of Pennsylvania, and James Iredell of North Carolina as Associate Justices. All were known to be champions of the Constitution, three had been members of the Federal Convention, four had held high judicial offices in their home States, and all but Jay were on record as advocates of the principle of judicial review. Jay was one of the authors of the *Federalist*,

had achieved a great diplomatic reputation in the negotiations of 1782, and possessed the political backing of the powerful Livingston family of New York.

The Judiciary Act provided for two terms of court annually, one commencing the first Monday of February, and the other on the first Monday of August. On February 2, 1790, the Court opened its doors for the first time in an upper room of the Exchange in New York City. Up to the February term of 1793 it had heard but five cases, and until the accession of Marshall it had decided but fifty-five. The justices were largely occupied in what one of them described as their "post-boy duties," that is, in riding their circuits. At first the justices rode in pairs and were assigned to particular circuits. As a result of this practice, the Southern justices were forced each year to make two trips of nearly two thousand miles each and, in order to hold court for two weeks, often passed two months on the road. In 1792, however, Congress changed the law to permit the different circuits to be taken in turn and by single justices, and in the meantime the Court had, in 1791, followed the rest of the Government to Philadelphia, a rather more central seat. Then, in 1802, the abolition of the August term eased the burdens of the justices still more.

But of course they still had to put up with bad roads, bad inns, and bad judicial quarters or sometimes none at all.

Yet that the life of a Supreme Court justice was not altogether one of discomfort is shown by the following alluring account of the travels of Justice Cushing on circuit: "He traveled over the whole of the Union, holding courts in Virginia, the Carolinas, and Georgia. His traveling equipage was a four-wheeled phaeton, drawn by a pair of horses, which he drove. It was remarkable for its many ingenious arrangements (all of his contrivance) for carrying books, choice groceries, and other comforts. Mrs. Cushing always accompanied him, and generally read aloud while riding. His faithful servant Prince, a jet-black negro, whose parents had been slaves in the family and who loved his master with unbounded affection, followed."<sup>1</sup> Compared with that of a modern judge always confronted with a docket of eight or nine hundred cases in arrears, Justice Cushing's lot was perhaps not so unenviable.

The pioneer work of the Supreme Court in constitutional interpretation has, for all but special

<sup>1</sup> Flanders, *The Lives and Times of the Chief-Justices of the Supreme Court*, vol. II, p. 38.

students, fallen into something like obscurity owing to the luster of Marshall's achievements and to his habit of deciding cases without much reference to precedent. But these early labors are by no means insignificant, especially since they pointed the way to some of Marshall's most striking decisions. In *Chisholm vs. Georgia*,<sup>1</sup> which was decided in 1793, the Court ruled, in the face of an assurance in the *Federalist* to the contrary, that an individual might sue a State; and though this decision was speedily disallowed by resentful debtor States by the adoption of the Eleventh Amendment, its underlying premise that, "as to the purposes of the Union, the States are not sovereign" remained untouched; and three years later the Court affirmed the supremacy of national treaties over conflicting state laws and so established a precedent which has never been disturbed.<sup>2</sup> Meantime the Supreme Court was advancing, though with notable caution, toward an assertion of the right to pass upon the constitutionality of acts of Congress. Thus in 1792, Congress ordered the judges while on circuit to pass upon pension claims, their determinations to be reviewable by the Secretary of the Treasury. In protests which they filed with the President, the

<sup>1</sup> 2 Dallas, 419.

<sup>2</sup> *Ware vs. Hylton*, 3 *ib.*, 199.

judges stated the dilemma which confronted them: either the new duty was a judicial one or it was not; if the latter, they could not perform it, at least not in their capacity as judges; if the former, then their decisions were not properly reviewable by an executive officer. Washington promptly sent the protests to Congress, whereupon some extremists raised the cry of impeachment; but the majority hastened to amend the Act so as to meet the views of the judges.<sup>1</sup> Four years later, in the Carriage Tax case,<sup>2</sup> the only question argued before the Court was that of the validity of a congressional excise. Yet as late as 1800 we find Justice Samuel Chase, of Maryland, who had succeeded Blair in 1795, expressing skepticism as to the right of the Court to disallow acts of Congress on the ground of their unconstitutionality, though at the same time admitting that the prevailing opinion among bench and bar supported the claim.

The great lack of the Federal Judiciary during these early years, and it eventually proved well-nigh fatal, was one of leadership. Jay was a satisfactory magistrate, but he was not a great force on the Supreme Bench, partly on account of his peculiarities of temperament and his ill

<sup>1</sup> See 2 Dallas, 409.

<sup>2</sup> *Hylton vs. United States*, 3 Dallas, 171.

health, and partly because, even before he resigned in 1795 to run for Governor in New York, his judicial career had been cut short by an important diplomatic assignment to England. His successor, Oliver Ellsworth, also suffered from ill health, and he too was finally sacrificed on the diplomatic altar by being sent to France in 1799. During the same interval there were also several resignations among the associate justices. So, what with its shifting personnel, the lack of business, and the brief semiannual terms, the Court secured only a feeble hold on the imagination of the country. It may be thought, no doubt, that judges anxious to steer clear of politics did not require leadership in the political sense. But the truth of the matter is that willy-nilly the Federal Judiciary at this period was bound to enter politics, and the only question was with what degree of tact and prudence this should be done. It was to be to the glory of Marshall that he recognized this fact perfectly and with mingled boldness and caution grasped the leadership which the circumstances demanded.

The situation at the beginning was precarious enough. While the Constitution was yet far from having commended itself to the back country democracy, that is, to the bulk of the American

people, the normal duties of the lower Federal Courts brought the judges into daily contact with prevalent prejudices and misconceptions in their most aggravated forms. Between 1790 and 1800 there were two serious uprisings against the new Government: the Whisky Rebellion of 1794 and Fries's Rebellion five years later. During the same period the popular ferment caused by the French Revolution was at its height. Entrusted with the execution of the laws, the young Judiciary "was necessarily thrust forward to bear the brunt in the first instance of all the opposition levied against the federal head," its revenue measures, its commercial restrictions, its efforts to enforce neutrality and to quell uprisings. In short, it was the point of attrition between the new system and a suspicious, excited populace.

Then, to make bad matters worse, Congress in 1798 passed the Sedition Act. Had political discretion instead of party venom governed the judges, it is not unlikely that they would have seized the opportunity presented by this measure to declare it void and by doing so would have made good their censorship of acts of Congress with the approval of even the Jeffersonian opposition. Instead, they enforced the Sedition Act, often with gratuitous rigor,



while some of them even entertained prosecutions under a supposed Common Law of the United States. The immediate sequel to their action was the claim put forth in the Virginia and Kentucky Resolutions that the final authority in interpreting the National Constitution lay with the local legislatures. Before the principle of judicial review was supported by a single authoritative decision, it had thus become a partisan issue!<sup>1</sup>

A few months later Jefferson was elected President, and the Federalists, seeing themselves about to lose control of the Executive and Congress, proceeded to take steps to convert the Judiciary into an avowedly partisan stronghold. By the Act of February 13, 1801, the number of associate justiceships was reduced to four, in the hope that the new Administration might in this way be excluded from the opportunity of making any appointments to the Supreme Bench, the number of district judgeships was enlarged by five, and six Circuit Courts were created which furnished places for sixteen more new judges. When John Adams, the retiring President, proceeded with the aid of the Federalist majority in the Senate

<sup>1</sup> See Herman V. Ames, *State Documents on Federal Relations*, Nos. 7-15

and of his Secretary of State, John Marshall, to fill up the new posts with the so-called "midnight judges,"<sup>1</sup> the rage and consternation of the Republican leaders broke all bounds. The Federal Judiciary, declared John Randolph, had become "an hospital of decayed politicians." Others pictured the country as reduced, under the weight of "super-numerary judges" and hosts of attendant lawyers, to the condition of Egypt under the Mamelukes. Jefferson's concern went deeper. "They have retired into the judiciary as a stronghold," he wrote Dickinson. "There the remains of Federalism are to be preserved and fed from the Treasury, and from that battery all the works of Republicanism are to be beaten down and destroyed." The Federal Judiciary, as a coördinate and independent branch of the Government, was confronted with a fight for life!

Meanwhile, late in November, 1800, Ellsworth had resigned, and Adams had begun casting about for his successor. First he turned to Jay, who declined on the ground that the Court, "under a system so defective," would never "obtain the

<sup>1</sup> So called because the appointment of some of them was supposed to have taken place as late as midnight, or later, of March 3-4, 1801. The supposition, however, was without foundation.

energy, weight, and dignity which were essential to its affording due support to the National Government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess." Adams now bethought himself of his Secretary of State and, without previously consulting him, on January 20, 1801, sent his name to the Senate. A week later the Senate ratified the nomination, and on the 4th of February Marshall accepted the appointment. The task despaired of by Jay and abandoned by Ellsworth was at last in capable hands.

## CHAPTER II

### MARSHALL'S EARLY YEARS

JOHN MARSHALL was born on September 24, 1755, in Fauquier County, Virginia. Though like Jefferson he was descended on his mother's side from the Randolphs of Turkey Island, colonial grandees who were also progenitors of John Randolph, Edmund Randolph, and Robert E. Lee, his father, Thomas Marshall, was "a planter of narrow fortune" and modest lineage and a pioneer. Fauquier was then on the frontier, and a few years after John was born the family moved still farther westward to a place called "The Hollow," a small depression on the eastern slope of the Blue Ridge. The external furnishings of the boy's life were extremely primitive, a fact which Marshall used later to recall by relating that his mother and sisters used thorns for buttons and that hot mush flavored with balm leaf was regarded as a very special dish. Neighbors, of course, were few and far between, but society was

not lacking for all that. As the first of fifteen children, all of whom reached maturity, John found ample opportunity to cultivate that affectionate helpfulness and gayety of spirit which in after years even enemies accounted one of his most notable traits.

Among the various influences which, during the plastic years of boyhood and youth, went to shape the outlook of the future Chief Justice high rank must be accorded his pioneer life. It is not merely that the spirit of the frontier, with its independence of precedent and its audacity of initiative, breathes through his great constitutional decisions, but also that in being of the frontier Marshall escaped being something else. Had he been born in lowland Virginia, he would have imbibed the intense localism and individualism of the great plantation, and with his turn of mind might well have filled the rôle of Calhoun instead of that very different rôle he actually did fill. There was, indeed, one great planter with whom young Marshall was thrown into occasional contact, and that was his father's patron and patron saint, Washington. The appeal made to the lad's imagination by the great Virginian was deep and abiding. And it goes without saying that the horizons suggested by the fame of

Fort Venango and Fort Duquesne were not those of seaboard Virginia but of America.

Many are the great men who have owed their debt to a mother's loving helpfulness and alert understanding. Marshall, on the other hand, was his father's child. "My father," he was wont to declare in after years, "was a far abler man than any of his sons. To him I owe the solid foundations of all my success in life." What were these solid foundations? One was a superb physical constitution; another was a taste for intellectual delights; and to the upbuilding of both these in his son, Thomas Marshall devoted himself with enthusiasm and masculine good sense, aided on the one hand by a very select library consisting of Shakespeare, Milton, Dryden, and Pope, and on the other by the ever fresh invitation of the mountainside to health-giving sports.

Pope was the lad's especial textbook, and we are told that he had transcribed the whole of the *Essay on Man* by the time he was twelve and some of the *Moral Essays* as well, besides having "committed to memory many of the most interesting passages of that distinguished poet." The result is to be partially discerned many years later in certain tricks of Marshall's style; but indeed the

influence of the great moralist must have penetrated far deeper. The *Essay on Man* filled, we may surmise, much the same place in the education of the first generation of American judges that Herbert Spencer's *Social Statics* filled in that of the judges of a later day. The *Essay on Man* pictures the universe as a species of constitutional monarchy governed "not by partial but by general laws"; in "man's imperial race" this beneficent sway expresses itself in two principles, "self-love to urge, and reason to restrain"; instructed by reason, self-love lies at the basis of all human institutions, the state, government, laws, and has "found the private in the public good"; so, on the whole, justice is the inevitable law of life. "Whatever is, is right." It is interesting to suppose that while Marshall was committing to memory the complacent lines of the *Essay on Man*, his cousin Jefferson may have been deep in the *Essay on the Origin of Inequality*.

At the age of fourteen Marshall was placed for a few months under the tuition of a clergyman named Campbell, who taught him the rudiments of Latin and introduced him to Livy, Cicero, and Horace. A little later the great debate over American rights burst forth and became with Marshall,



as with so many promising lads of the time, the decisive factor in determining his intellectual bent, and he now began reading Blackstone. The great British orators, however, whose eloquence had so much to do, for instance, with shaping Webster's genius, came too late to influence him greatly.

The part which the War of Independence had in shaping the ideas and the destiny of John Marshall was most important. As the news of Lexington and Bunker Hill passed the Potomac, he was among the first to spring to arms. His services at the siege of Norfolk, the battles of Brandywine, Germantown, and Monmouth, and his share in the rigors of Valley Forge and in the capture of Stony Point, made him an American before he had ever had time to become a Virginian. As he himself wrote long afterwards: "I had grown up at a time when the love of the Union and the resistance to Great Britain were the inseparable inmates of the same bosom; . . . when the maxim 'United we stand, divided we fall' was the maxim of every orthodox American. And I had imbibed these sentiments so thoroughly that they constituted a part of my being. I carried them with me into the army, where I found myself associated with brave men from different States, who were risking life and everything valuable in a common

cause believed by all to be most precious, and where I was confirmed in the habit of considering America as my country and Congress as my government.”

Love of country, however, was not the only quality which soldiering developed in Marshall. The cheerfulness and courage which illuminated his patriotism brought him popularity among men. Though but a lieutenant, he was presently made a deputy judge advocate. In this position he displayed notable talent in adjusting differences between officers and men and also became acquainted with Washington's brilliant young secretary, Alexander Hamilton.

While still in active service in 1780, Marshall attended a course of law lectures given by George Wythe at William and Mary College. He owed this opportunity to Jefferson, who was then Governor of the State and who had obtained the abolition of the chair of divinity at the college and the introduction of a course in law and another in medicine. Whether the future Chief Justice was prepared to take full advantage of the opportunity thus offered is, however, a question. He had just fallen heels over head in love with Mary Ambler, whom three years later he married, and his notebook seems to show us that his thoughts

were quite as much upon his sweetheart as upon the lecturer's wisdom.

None the less, as soon as the Courts of Virginia reopened, upon the capitulation of Cornwallis, Marshall hung out his shingle at Richmond and began the practice of his profession. The new capital was still hardly more than an outpost on the frontier, and conditions of living were rude in the extreme. "The Capitol itself," we are told, "was an ugly structure — 'a mere wooden barn' — on an unlovely site at the foot of a hill. The private dwellings scattered about were poor, mean, little wooden houses." "Main Street was still unpaved, deep with dust when dry and so muddy during a rainy season that wagons sank up to the axles." It ended in gullies and swamps. Trade, which was still in the hands of the British merchants, involved for the most part transactions in skins, furs, ginseng, snakeroot, and "dried rattlesnakes — used to make a viper broth for consumptive patients." "There was but one church building and attendance was scanty and infrequent." Not so, however, of Farmicola's tavern, whither card playing, drinking, and ribaldry drew crowds, especially when the legislature was in session.<sup>1</sup>

<sup>1</sup> Beveridge, vol. I, pp. 171-73.

But there was one institution of which Richmond could boast, even in comparison with New York, Boston, or Philadelphia, and that was its Bar. Randolph, Wickham, Campbell, Call, Pendleton, Wythe — these are names whose fame still survives wherever the history of the American Bar is cherished; and it was with their living bearers that young Marshall now entered into competition. The result is somewhat astonishing at first consideration, for even by the standards of his own day, when digests, indices, and the other numerous aids which now ease the path of the young attorney were generally lacking, his preparation had been slight. Several circumstances, however, came to his rescue. So soon after the Revolution British precedents were naturally rather out of favor, while on the other hand many of the questions which found their way into the courts were those peculiar to a new country and so were without applicable precedents for their solution. What was chiefly demanded of an attorney in this situation was a capacity for attention, the ability to analyze an opponent's argument, and a discerning eye for fundamental issues. Competent observers soon made the discovery that young Marshall possessed all these faculties to a marked degree and, what was

just as important, his modesty made recognition by his elders easy and gracious.

From 1782 until the adoption of the Constitution, Marshall was almost continuously a member of the Virginia Legislature. He thus became a witness of that course of policy which throughout this period daily rendered the state governments more and more "the hope of their enemies, the despair of their friends." The termination of hostilities against England had relaxed the already feeble bonds connecting the States. Congress had powers which were only recommendatory, and its recommendations were ignored by the local legislatures. The army, unpaid and frequently in actual distress, was so rapidly losing its morale, that it might easily become a prey to demagogues. The treaties of the new nation were flouted by every State in the Union. Tariff wars and conflicting land grants embittered the relations of sister States. The foreign trade of the country, it was asserted, "was regulated, taxed, monopolized, and crippled at the pleasure of the maritime powers of Europe." Burdened with debts which were the legacy of an era of speculation, a considerable part of the population, especially of the farmer class, was demanding measures of relief which threatened the

security of contracts. "Laws suspending the collection of debts, insolvent laws, instalment laws, tender laws, and other expedients of a like nature, were familiarly adopted or openly and boldly vindicated."<sup>1</sup>

From the outset Marshall ranged himself on the side of that party in the Virginia Legislature which, under the leadership of Madison, demanded with growing insistence a general and radical constitutional reform designed at once to strengthen the national power and to curtail state legislative power. His attitude was determined not only by his sympathy for the sufferings of his former comrades in arms and by his veneration for his father and for Washington, who were of the same party, but also by his military experience, which had rendered the pretensions of state sovereignty ridiculous in his eyes. Local discontent came to a head in the autumn of 1786 with the outbreak of Shays's Rebellion in western Massachusetts. Marshall, along with the great body of public men of the day, conceived for the movement the gravest alarm, and the more so since he considered it as the natural

<sup>1</sup> This review of conditions under the later Confederation is taken from Story's *Discourse*, which is in turn based, at this point, on Marshall's *Life of Washington* and certain letters of his to Story.

culmination of prevailing tendencies. In a letter to James Wilkinson early in 1787, he wrote: "These violent . . . dissensions in a State I had thought inferior in wisdom and virtue to no one in our Union, added to the strong tendency which the politics of many eminent characters among ourselves have to promote private and public dishonesty, cast a deep shade over that bright prospect which the Revolution in America and the establishment of our free governments had opened to the votaries of liberty throughout the globe. I fear, and there is no opinion more degrading to the dignity of man, that those have truth on their side who say that man is incapable of governing himself."

Marshall accordingly championed the adoption of the Constitution of 1787 quite as much because of its provisions for diminishing the legislative powers of the States in the interest of private rights as because of its provisions for augmenting the powers of the General Government. His attitude is revealed, for instance, in the opening words of his first speech on the floor of the Virginia Convention, to which he had been chosen a member from Richmond: "Mr. Chairman, I conceive that the object of the discussion now before us is whether democracy or despotism be most eligible. . . . The



supporters of the Constitution claim the title of being firm friends of liberty and the rights of man. . . . We prefer this system because we think it a well-regulated democracy. . . . What are the favorite maxims of democracy? A strict observance of justice and public faith. . . . Would to Heaven that these principles had been observed under the present government. Had this been the case the friends of liberty would not be willing now to part with it." The point of view which Marshall here assumed was obviously the same as that from which Madison, Hamilton, Wilson, and others on the floor of the Federal Convention had freely predicted that republican liberty must disappear from the earth unless the abuses of it practiced in many of the States could be eliminated.

Marshall's services in behalf of the Constitution in the closely fought battle for ratification which took place in the Virginia Convention are only partially disclosed in the pages of Elliot's *Debates*. He was already coming to be regarded as one excellent in council as well as in formal discussion, and his democratic manners and personal popularity with all classes were a pronounced asset for any cause he chose to espouse. Marshall's part on the floor of the Convention was, of course, much less conspicuous

than that of either Madison or Randolph, but in the second rank of the Constitution's defenders, including men like Corbin, Nicholas, and Pendleton, he stood foremost. His remarks were naturally shaped first of all to meet the immediate necessities of the occasion, but now and then they foreshadow views of a more enduring value. For example, he met a favorite contention of the opposition by saying that arguments based on the assumption that necessary powers would be abused were arguments against government in general and "a recommendation of anarchy." To Henry's despairing cry that the proposed system lacked checks, he replied: "What has become of his enthusiastic eulogium of the American spirit? We should find a check and control, when oppressed, from that source. In this country there is no exclusive personal stock of interest. The interest of the community is blended and inseparably connected with that of the individual. . . . When we consult the common good, we consult our own." And when Henry argued that a vigorous union was unnecessary because "we are separated by the sea from the powers of Europe," Marshall replied: "Sir, the sea makes them neighbors of us."

It is worthy of note that Marshall gave his greatest attention to the judiciary article as it appeared in the proposed Constitution. He pointed out that the principle of judicial independence was here better safeguarded than in the Constitution of Virginia. He stated in one breath the principle of judicial review and the doctrine of enumerated powers. If, said he, Congress "make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard; they would not consider such a law as coming within their jurisdiction. They would declare it void."<sup>1</sup> On the other hand, Marshall scoffed at the idea that the citizen of a State might bring an original action against another State in the Supreme Court. His dissections of Mason's and Henry's arguments frequently exhibit controversial skill of a high order. From Henry, indeed, Marshall drew a notable tribute to his talent, which was at the same time proof of his ability to keep friends with his enemies.

<sup>1</sup> J. Elliot, *Debates* (Edition of 1836), vol. III, p. 503. As to Bills of Rights, however, Marshall expressed the opinion that they were meant to be "merely recommendatory. Were it otherwise, . . . many laws which are found convenient would be unconstitutional." *Op. cit.*, vol. III, p. 509.

On the day the great Judiciary Act became law, Marshall attained his thirty-fourth year. His stride toward professional and political prominence was now rapid. At the same time his private interests were becoming more closely interwoven with his political principles and personal affiliations, and his talents were maturing. Hitherto his outlook upon life had been derived largely from older men, but his own individuality now began to assert itself; his groove in life was taking final shape.

The best description of Marshall shows him in the prime of his manhood a few months after his accession to the Supreme Bench. It appears in William Wirt's celebrated *Letters of the British Spy*:

The [Chief Justice] of the United States is, in his person, tall, meager, emaciated; his muscles relaxed, and his joints so loosely connected, as not only to disqualify him, apparently for any vigorous exertion of body, but to destroy everything like elegance and harmony in his air and movements. Indeed, in his whole appearance, and demeanour; dress, attitudes, gesture; sitting, standing or walking; he is as far removed from the idolized graces of Lord Chesterfield, as any other gentleman on earth. To continue the portrait: his head and face are small in proportion to his height; his complexion swarthy; the muscles of his face, being relaxed, give him the appearance of a man of fifty years of age, nor can he be much younger; his countenance has a faithful expression of

great good humour and hilarity; while his black eyes — that unerring index — possess an irradiating spirit, which proclaims the imperial powers of the mind that sits enthroned within.

The “British Spy” then describes Marshall’s personality as an orator at the time when he was still practicing at the Virginia bar:

His voice [the description continues] is dry and hard; his attitude, in his most effective orations, was often extremely awkward, as it was not unusual for him to stand with his left foot in advance, while all his gestures proceeded from his right arm, and consisted merely in a vehement, perpendicular swing of it from about the elevation of his head to the bar, behind which he was accustomed to stand. . . . [Nevertheless] if eloquence may be said to consist in the power of seizing the attention with irresistible force, and never permitting it to elude the grasp until the hearer has received the conviction which the speaker intends, [then] this extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of an orator, deserves to be considered as one of the most eloquent men in the world. . . . He possesses one original, and, almost, supernatural faculty; the faculty of developing a subject by a single glance of his mind, and detecting at once, the very point on which every controversy depends. No matter what the question; though ten times more knotty than the gnarled oak, the lightning of heaven is not more rapid nor more resistless, than his astonishing penetration. Nor does

the exercise of it seem to cost him an effort. On the contrary, it is as easy as vision. I am persuaded that his eyes do not fly over a landscape and take in its various objects with more promptitude and facility, than his mind embraces and analyzes the most complex subject.

Possessing while at the bar this intellectual elevation, which enables him to look down and comprehend the whole ground at once, he determined immediately and without difficulty, on which side the question might be most advantageously approached and assailed. In a bad cause his art consisted in laying his premises so remotely from the point directly in debate, or else in terms so general and so spacious, that the hearer, seeing no consequence which could be drawn from them, was just as willing to admit them as not; but his premises once admitted, the demonstration, however distant, followed as certainly, as cogently, as inevitably, as any demonstration in Euclid.

All his eloquence consists in the apparently deep self-conviction, and emphatic earnestness of his manner, the correspondent simplicity and energy of his style; the close and logical connexion of his thoughts; and the easy gradations by which he opens his lights on the attentive minds of his hearers.

The audience are never permitted to pause for a moment. There is no stopping to weave garlands of flowers, to hang in festoons, around a favorite argument. On the contrary, every sentence is progressive; every idea sheds new light on the subject; the listener is kept perpetually in that sweetly pleasurable vibration, with which the mind of man always receives new truths; the dawn advances in easy but unremitting pace; the subject opens gradually on the view; until, rising in high

relief, in all its native colors and proportions, the argument is consummated by the conviction of the delighted hearer.

What appeared to Marshall's friends as most likely in his early middle years to stand in the way of his advancement was his addiction to ease and to a somewhat excessive conviviality. But it is worth noting that the charge of conviviality was never repeated after he was appointed Chief Justice; and as to his unstudious habits, therein perhaps lay one of the causes contributing to his achievement. Both as attorney and as judge, he preferred the quest of broad, underlying principles, and, with plenty of time for recuperation from each exertion, he was able to bring to each successive task undiminished vitality and unclouded attention. What the author of the *Leviathan* remarks of himself may well be repeated of Marshall — that he made more use of his brains than of his bookshelves and that, if he had read as much as most men, he would have been as ignorant as they.

That Marshall was one of the leading members of his profession in Virginia, the most recent biographical researches unmistakably prove. "From 1790 until his election to Congress nine years



later," Albert J. Beveridge<sup>1</sup> writes, "Marshall argued 113 cases decided by the court of appeals of Virginia. . . . He appeared during this time in practically every important cause heard and determined by the supreme tribunal of the State." Practically all this litigation concerned property rights, and much of it was exceedingly intricate. Marshall's biographer also points out the interesting fact that "whenever there was more than one attorney for the client who retained Marshall, the latter almost invariably was retained to make the closing argument." He was thus able to make good any lack of knowledge of the technical issues involved as well as to bring his great debating powers to bear with the best advantage.

Meanwhile Marshall was also rising into political prominence. From the first a supporter of Washington's Administration, he was gradually thrust into the position of Federalist leader in Virginia. In 1794 he declined the post of Attorney-General, which Washington had offered him. In the following year he became involved in the acrimonious struggle over the Jay Treaty with Great Britain, and both in the Legislature and before meetings of citizens defended the treaty so aggressively that its

<sup>1</sup> *The Life of John Marshall*, vol. II, p. 177.

opponents were finally forced to abandon their contention that it was unconstitutional and to content themselves with a simple denial that it was expedient. Early in 1796 Marshall made his first appearance before the Supreme Court, in the case of *Ware vs. Hylton*. The fame of his defense of "the British Treaty" during the previous year had preceded him, and his reception by the Federalist leaders from New York and New England was notably cordial. His argument before the Court, too, though it did not in the end prevail, added greatly to his reputation. "His head," said Rufus King, who heard the argument, "is one of the best organized of any one that I have known."

Either in 1793 or early in the following year, Marshall participated in a business transaction which, though it did not impart to his political and constitutional views their original bent, yet must have operated more or less to confirm his opinions. A syndicate composed of Marshall, one of his brothers, and two other gentlemen, purchased from the British heirs what remained of the great Fairfax estate in the Northern Neck, a tract "embracing over 160,000 acres of the best land in Virginia." By an Act passed during the Revolution, Virginia had decreed the confiscation of all lands held by

British subjects; and though the State had never prosecuted the forfeiture of this particular estate, she was always threatening to do so. Marshall's investment thus came to occupy for many years a precarious legal footing which, it may be surmised, did not a little to keep alert his natural sympathy for all victims of legislative oppression. Moreover the business relation which he formed with Robert Morris in financing the investment brought him into personal contact for the first time with the interests behind Hamilton's financial program, the constitutionality of which he had already defended on the hustings.

It was due also to this business venture that Marshall was at last persuaded to break through his rule of declining office and to accept appointment in 1797, together with Pinckney and Gerry, on the famous "X.Y.Z." mission to France. From this single year's employment he obtained nearly \$20,000, which, says his biographer, "over and above his expenses," was "three times his annual earnings at the bar"; and the money came just in the nick of time to save the Fairfax investment, for Morris was now bankrupt and in jail. But not less important as a result of his services was the enhanced reputation which Marshall's correspondence

with Talleyrand brought him. His return to Philadelphia was a popular triumph, and even Jefferson, temporarily discomfited by the "X.Y.Z." disclosures, found it discreet to go through the form of paying him court — whereby hangs a tale. Jefferson called at Marshall's tavern. Marshall was out. Jefferson thereupon left a card deploring how "<sup>un</sup>lucky" he had been. Commenting years afterwards upon the occurrence, Marshall remarked that this was one time at least when Jefferson came *near* telling the truth.

Through the warm insistence of Washington, Marshall was finally persuaded in the spring of 1799 to stand as Federalist candidate for Congress in the Richmond district. The expression of his views at this time is significant. A correspondent of an Alexandria newspaper signing himself "Freeholder" put to him a number of questions intended to call forth Marshall's opinions on the issues of the day. In answering a query as to whether he favored an alliance with Great Britain, the candidate declared that the whole of his "politics respecting foreign nations" was "reducible to this single position. . . . Commercial intercourse with all, but political ties with none." But a more pressing issue on which the public wished information was

that furnished by the Alien and Sedition laws, which Marshall had originally criticized on grounds both of expediency and of constitutionality. Now, however, he defended these measures on constitutional grounds, taking the latitudinarian position that "powers necessary for the attainment of all objects which are general in their nature, which interest all America . . . would be naturally vested in the Government of the whole," but he declared himself strongly opposed to their renewal. At the same time he denounced the Virginia Resolutions as calculated "to sap the foundations of our Union."

The election was held late in April, under conditions which must have added greatly to popular interest. Following the custom in Virginia, the voter, instead of casting a ballot, merely declared his preference in the presence of the candidates, the election officials, and the assembled multitude. In the intensity of the struggle no voter, halt, lame, or blind, was overlooked; and a barrel of whisky near at hand lent further zest to the occasion. Time and again the vote in the district was a tie, and as a result frequent personal encounters took place between aroused partisans. Marshall's election by a narrow majority in a borough which was strongly

pro-Jeffersonian was due, indeed, not to his principles but to his personal popularity and to the support which he received from Patrick Henry, the former Governor of the State.

The most notable event of his brief stay in Congress was his successful defense of President Adams's action in handing over to the British authorities, in conformity with the twenty-seventh article of the Jay treaty, Jonathan Robins, who was alleged to be a fugitive from justice. Adams's critics charged him with having usurped a judicial function. "The President," said Marshall in reply, "is sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him. He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty where he, and he alone, possesses the means of executing it." This is one of the few speeches ever uttered on the floor of Congress which demonstrably made votes. Gallatin, who had been set to answer Marshall,

threw up his brief; and the resolutions against the President were defeated by a House hostile to him.

Marshall's course in Congress was characterized throughout by independence of character, moderation of views, and level good sense, of which his various congressional activities afford abundant evidence. Though he had himself been one of the "X.Y.Z." mission, Marshall now warmly supported Adams's policy of renewing diplomatic relations with France. He took his political life in his hands to register a vote against the Sedition Act, a proposal to repeal which was brought before the House. He foiled a scheme which his party associates had devised, in view of the approaching presidential election, to transfer to a congressional committee the final authority in canvassing the electoral vote — a plan all too likely to precipitate civil war. His Federalist brethren of the extreme Hamiltonian type quite resented the frequency with which he was wont to kick over the party traces. "He is disposed," wrote Sedgwick, the Speaker, "to express great respect for the sovereign people and to quote their opinions as an evidence of truth," which "is of all things the most destructive of personal independence and of that weight of



character which a great man ought to possess.”<sup>1</sup>

Marshall had now come to be practically indispensable to the isolated President, at whose most earnest insistence he entered the Cabinet as Secretary of State, though he had previously declined to become Secretary of War. The presidential campaign was the engrossing interest of the year, and as it spread its “havoc of virulence” throughout the country, Federalists of both factions seemed to turn to Marshall in the hope that, by some miracle of conciliation, he could save the day. The hope proved groundless, however, and all that was ultimately left the party which had founded the Government was to choose a President from the rival leaders of the opposition. Of these Marshall preferred Burr, because, as he explained, he knew Jefferson’s principles better. Besides having foreign prejudices, Mr. Jefferson, he continued, “appears to me to be a man who will embody himself with the House of Representatives, and by weakening the office of President, he will increase his personal power.” Better political prophecy has, indeed, rarely been penned. Deferring nevertheless to Hamilton’s insistence — and, as events were to

<sup>1</sup> Letter from Sedgwick to King, May 11, 1800. *Life and Correspondence of Rufus King*, vol. III, pp. 236-7.

prove, to his superior wisdom — Marshall kept aloof from the fight in the House, and his implacable foe was elected.

Marshall was already one of the eminent men of the country when Adams, without consulting him, nominated him for Chief Justice. He stood at the head of the Virginia bar; he was the most generally trusted leader of his party; he already had a national reputation as an interpreter of the Constitution. Yet his appointment as Chief Justice aroused criticism even among his party friends. Their doubt did not touch his intellectual attainments, but in their opinion his political moderation, his essential democracy, his personal amiability, all counted against him. "He is," wrote Sedgwick, "a man of very affectionate disposition, of great simplicity of manners, and honest and honorable in all his conduct. He is attached to pleasures, with convivial habits strongly fixed. He is indolent therefore. He has a strong attachment to popularity but is indisposed to sacrifice to it his integrity; hence he is disposed on all popular subjects to feel the public pulse, and hence results indecision and *an expression of doubt.*"<sup>1</sup>

It was perhaps fortunate for the Federal Judi-

<sup>1</sup> *Op. cit.*

ciary, of which he was now to take command, that John Marshall was on occasion "disposed . . . to feel the public pulse." A headstrong pilot might speedily have dashed his craft on the rocks; a timid one would have abandoned his course; but Marshall did neither. The better answer to Sedgwick's fears was given in 1805 when John Randolph declared that Marshall's "real worth was never known until he was appointed Chief Justice." And Sedgwick is further confuted by the portraits of the Chief Justice, which, with all their diversity, are in accord on that stubborn chin, that firm placid mouth, that steady, benignant gaze, so capable of putting attorneys out of countenance when they had to face it overlong. Here are the lineaments of self-confidence unmarred by vanity, of dignity without condescension, of tenacity untouched by fanaticism, and above all, of an easy conscience and unruffled serenity. It required the lodestone of a great and thoroughly congenial responsibility to bring to light Marshall's real metal.

## CHAPTER III

### JEFFERSON'S WAR ON THE JUDICIARY

By a singular coincidence Marshall took his seat as Chief Justice at the opening of the first term of Court in Washington, the new capital, on Wednesday, February 4, 1801. The most beautiful of capital cities was then little more than a swamp, athwart which ran a streak of mire named by solemn congressional enactment "Pennsylvania Avenue." At one end of this difficult thoroughfare stood the President's mansion — still in the hands of the builders but already sagging and leaking through the shrinkage of the green timber they had used — two or three partially constructed office-buildings, and a few private edifices and boarding houses. Marshall never removed his residence to Washington but occupied chambers in one or other of these buildings, in company with some of the associate justices. This arrangement was practicable owing to the brevity of the judicial term,

which usually lasted little more than six weeks, and was almost necessitated by the unhealthy climate of the place. It may be conjectured that the life of John Marshall was prolonged for some years by the Act of 1802, which abolished the August term of court, for in the late summer and early autumn the place swarmed with mosquitoes and reeked with malaria.

The Capitol, which stood at the other end of Pennsylvania Avenue, was in 1801 even less near completion than the President's house; at this time the south wing rose scarcely twenty feet above its foundations. In the north wing, which was nearer completion, in a basement chamber, approached by a small hall opening on the eastern side of the Capitol and flanked by pillars carved to represent bundles of cornstalks with ears half opened at the top, Marshall held court for more than a third of a century and elaborated his great principles of constitutional law. This room, untouched by British vandalism in the invasion of 1814, was christened by the witty malignity of John Randolph, "the cave of Trophonius."<sup>1</sup>

<sup>1</sup> It should, however, be noted in the interest of accuracy, that the Court does not seem to have occupied its basement chamber during the years 1814 to 1818, while the Capitol was under repair.

It was in the Senate Chamber in this same north wing that Marshall administered the oath of office to Jefferson just one month after he himself had taken office. There have been in American history few more dramatic moments, few more significant, than this occasion when these two men confronted each other. They detested each other with a detestation rooted in the most essential differences of character and outlook. As good fortune arranged it, however, each came to occupy precisely that political station in which he could do his best work and from which he could best correct the bias of the other. Marshall's nationalism rescued American democracy from the vaguer horizons to which Jefferson's cosmopolitanism beckoned, and gave to it a secure abode with plenty of elbow-room. Jefferson's emphasis on the right of the contemporary majority to shape its own institutions prevented Marshall's constitutionalism from developing a privileged aristocracy. Marshall was finely loyal to principles accepted from others; Jefferson was speculative, experimental; the personalities of these two men did much to conserve essential values in the American Republic.

As Jefferson turned from his oath-taking to deliver his inaugural, Marshall must have listened

with attentive ears for some hint of the attitude which the new Administration proposed to take with regard to the Federal Judiciary and especially with regard to the recent act increasing its numbers; but if so, he got nothing for his pains. The new President seemed particularly bent upon dispelling any idea that there was to be a political proscription. Let us, said he, "unite with one heart and one mind. Let us restore to social intercourse that harmony and affection without which liberty and even life itself are but dreary things. . . . Every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all Republicans, we are all Federalists."

Notwithstanding the reassurance of these words, the atmosphere both of official Washington and of the country at large was electric with dangerous currents — dangerous especially to judges — and Jefferson was far too well known as an adept in the manipulation of political lightning to admit of much confidence that he would fail to turn these forces against his enemy when the opportune moment should arrive. The national courts were regarded with more distrust by the mass of Republicans than any other part of the hated system



created by the once dominant Federalists. The reasons why this was so have already been indicated, but the most potent reason in 1801, because it was still freshest in mind, was the domineering part which the national judges had played in the enforcement of the Sedition Act. The terms of this illiberal measure made, and were meant to make, criticism of the party in power dangerous. The judges — Federalists to a man and bred, moreover, in a tradition which ill distinguished the office of judge from that of prosecutor — felt little call to mitigate the lot of those who fell within the toils of the law under this Act. A shining mark for the Republican enemies of the Judiciary was Justice Samuel Chase of the Supreme Court. It had fallen to Chase's lot to preside successively at the trial of Thomas Cooper for sedition, at the second trial of John Fries for treason, and at the trial of James Thompson Callender at Richmond for sedition. On each of the two latter occasions the defendant's counsel, charging "oppressive conduct" on the part of the presiding judge, had thrown up their briefs and rushed from the court room. In 1800 there were few Republicans who did not regard Chase as "the bloody Jeffreys of America."

Local conditions also frequently accentuated the prevailing prejudice against the Judiciary. The people of Kentucky, afraid that their badly tangled land titles were to be passed upon by the new Federal Courts, were already insisting, when Jefferson took office, that the Act of the 13th of February creating these courts be repealed. In Maryland extensive and radical alterations of the judicial system of the State were pending. In Pennsylvania the situation was even more serious, for though the judges of the higher courts of that commonwealth were usually men of ability, education, and character, the inferior magistrates were frequently the very opposite. By the state constitution judges were removable for serious offenses by impeachment, and for lesser reasons by the Governor upon the address of two-thirds of both branches of the Legislature. So long, however, as the Federalists had remained in power neither remedy had been applied; but in 1799, when the Republicans had captured both the governorship and the Legislature, a much needed purgation of the lower courts had forthwith begun.

Unfortunately this is a sort of reform that grows by what it feeds upon. Having got rid of the less fit members of the local judiciary, the Republican

leaders next turned their attention to some of their aggressive party foes on the Superior Bench. The most offensive of these was Alexander Addison, president of one of the Courts of Common Pleas of the State. He had started life as a Presbyterian preacher and had found it natural to add to his normal judicial duties the business of inculcating "sound morals and manners."<sup>1</sup> Addison had at once taken the Alien and Sedition laws under his wing, though their enforcement did not fall within his jurisdiction, and he found in the progress of the French Revolution numerous texts for partisan harangues to county juries. For some reason Addison's enemies decided to resort to impeachment rather than to removal by address; and, as a result, in January, 1803, the State Senate found him guilty of "misdemeanor," ordered his removal from office, and disqualified him for judicial office in Pennsylvania. Not long afterwards the House of Representatives granted without inquiry or discussion a petition to impeach three members of the Supreme Court of the State for having

<sup>1</sup> President Dickinson of Pennsylvania wrote the Chief Justice and judges of the Supreme Court of the Commonwealth, on October 8, 1785, that they ought not to content themselves merely with enforcing the law, but should also endeavor to "inculcate sound morals and manners." *Pennsylvania Archives*, vol. x, pp. 623-24.

punished one Thomas Passmore for contempt of court without a jury trial.

Jefferson entered office with his mind made up that the Act of the 13th of February should be repealed.<sup>1</sup> He lacked only a theory whereby he could reconcile this action with the Constitution, and that was soon forthcoming. According to the author of this theory, John Taylor of Caroline, a budding "Doctor Irrefragabilis" of the State Rights school, the proposed repeal raised two questions: first, whether Congress could abolish courts created by a previous act of Congress; and second, whether, with such courts abolished, their judges still retained office. Addressing himself to the first question, Taylor pointed out that the Act of the 13th of February had itself by instituting a new system abolished the then existing inferior courts. As to the second point, he wrote thus: "The Constitution declares that the judge shall hold his office during good behavior. Could it mean that he should hold office after it had been abolished? Could it mean that his tenure should be limited by behaving well in an office which did not exist?" A

<sup>1</sup> In this connection Mr. Beveridge draws my attention to Jefferson's letter to A. Stuart of April 5, 1801. See the *Complete Works of Jefferson* (Washington, 1857), vol. iv, p. 393.

construction based on such absurdities, said he, "overturns the benefits of language and intellect."

In his message of December 8, 1801, Jefferson gave the signal for the repeal of the obnoxious measure, and a month later Breckinridge of Kentucky introduced the necessary resolution in the Senate. In the prolonged debate which followed, the Republicans in both Senate and House rang the changes on Taylor's argument. The Federalists made a twofold answer. Some, accepting the Republican premise that the fate of the judge was necessarily involved with that of the court, denied *in toto* the validity of repeal. Gouverneur Morris, for instance, said: "You shall not take the man from the office but you may take the office from the man; you may not drown him, but you may sink his boat under him. . . . Is this not absurd?" Other Federalists, however, were ready to admit that courts of statutory origin could be abolished by statute but added that the operation of Congress's power in this connection was limited by the plain requirement of the Constitution that judges of the United States should hold office during good behavior. Hence, though a valid repeal of the Act in question would take from the judges the powers which they derived from its provisions, the repeal

would still leave them judges of the United States until they died, resigned, or were legally removed in consequence of impeachment. The Federalist orators in general contended that the spirit of the Constitution confirmed its letter, and that its intention was clear that the national judges should pass finally upon the constitutionality of acts of Congress and should therefore be as secure as possible from legislative molestation.

The repeal of this Act was voted by a strict party majority and was reënforced by a provision postponing the next session of the Supreme Court until the following February. The Republican leaders evidently hoped that by that time all disposition to test the validity of the Repealing Act in the Court would have passed. But by this very precaution they implied a recognition of the doctrine of judicial review and the whole trend of the debate abundantly confirmed this implication. Breckinridge, Randolph, and Giles, it is true, scouted the claim made for the courts as "unheard-of doctrine," and as "mockery of the high powers of legislation"; but the rank and file of their followers, with the excesses of the French Revolution a recent memory and a "consolidated government" a recent fear, were not to be seduced from what they clearly

regarded as established doctrine. Moreover, when it came to legislation concerning the Supreme Court, the majority of the Republicans again displayed genuine moderation, for, thrusting aside an obvious temptation to swamp that tribunal with additional judges of their own creed, they merely restored it to its original size under the Act of 1789.

Nevertheless the most significant aspect in the repeal of the Act of the 13th of February was the fact itself. The Republicans had not shown a more flagrant partisanship in effecting this repeal than had the Federalists in originally enacting the measure which was now at an end. Though the Federalists had sinned first, the fact nevertheless remained that in realizing their purpose the Republican majority had established a precedent which threatened to make of the lower Federal Judiciary the merest cat's-paw of party convenience. The attitude of the Republican leaders was even more menacing, for it touched the security of the Supreme Court itself in the enjoyment of its highest prerogative and so imperiled the unity of the nation. Beyond any doubt the moment was now at hand when the Court must prove to its supporters that it was still worth defending and to all that the Constitution had an authorized final interpreter.



Marshall's first constitutional case was that of *Marbury vs. Madison*.<sup>1</sup> The facts of this famous litigation are simple. On March 2, 1801, William Marbury had been nominated by President Adams to the office of Justice of the Peace in the District of Columbia for five years; his nomination had been ratified by the Senate; his commission had been signed and sealed; but it had not yet been delivered when Jefferson took office. The new President ordered Madison, his Secretary of State, not to deliver the commission. Marbury then applied to the Supreme Court for a writ of mandamus to the Secretary of State under the supposed authorization of the thirteenth section of the Act of 1789, which empowered the Court to issue the writ "in cases warranted by the principles and usages of law to . . . persons holding office under the authority of the United States." The Court at first took jurisdiction of the case and issued a rule to the Secretary of State ordering him to show cause, but it ultimately dismissed the suit for want of jurisdiction on the ground that the thirteenth section was unconstitutional.

Such are the lawyer's facts of the case; it is the

<sup>1</sup> 1 Cranch, 137. The following account of the case is drawn largely upon my *Doctrine of Judicial Review* (Princeton, 1914).

historian's facts about it which are today the interesting and instructive ones. Marshall, reversing the usual order of procedure, left the question of jurisdiction till the very last, and so created for himself an opportunity to lecture the President on his duty to obey the law and to deliver the commission. Marshall based his homily on the questionable assumption that the President had not the power to remove Marbury from office, for if he had this power the nondelivery of the document was of course immaterial. Marshall's position was equally questionable when he contended that the thirteenth section violated that clause of Article III of the Constitution which gives the Supreme Court original jurisdiction "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party." These words, urged the Chief Justice, must be given an exclusive sense "or they have no operation at all." This position is quite untenable, for even when given only their affirmative value these words still place the cases enumerated beyond the reach of Congress, and this may have been their only purpose. However, granting the Chief Justice his view of Article III, still we are not forced to challenge the validity of what Congress had done. For the

view taken a little later by the Court was that it was not the intention of Congress by this language to confer any jurisdiction at all, but only to give the right to issue the writ where the jurisdiction already existed. What the Court should have done, allowing its view of Article III to have been correct, was to dismiss the case as not falling within the contemplation of section thirteen, and not on the ground of the unconstitutionality of that section.

Marshall's opinion in *Marbury vs. Madison* was a political *coup* of the first magnitude, and by it he achieved half a dozen objects, some of the greatest importance. In the first place, while avoiding a direct collision with the executive power, he stigmatized his enemy Jefferson as a violator of the laws which as President he was sworn to support. Again, he evaded the perilous responsibility of passing upon the validity of the recent Repeal Act in quo warranto proceedings, such as were then being broached.<sup>1</sup> For if the Supreme Court could not

<sup>1</sup> See Benton's *Abridgment of the Debates of Congress*, vol. II, pp. 665-68. Marshall expressed the opinion in private that the repealing act was "operative in depriving the judges of all power derived from the act repealed" but not their office, "which is a mere capacity, without new appointment, to receive and exercise any new judicial power which the legislature may confer." Quoted by W. S. Carpenter in *American Political Science Review*, vol. IX, p. 528.

issue the writ of mandamus in suits begun in it by individuals, neither could it issue the writ of quo warranto in such suits. Yet again Marshall scored in exhibiting the Court in the edifying and reassuring light of declining, even from the hands of Congress, jurisdiction to which it was not entitled by the Constitution, an attitude of self-restraint which emphasized tremendously the Court's claim to the function of judicial review, now first definitely registered in deliberate judicial decision.

At this point in Marshall's handling of the case the consummate debater came to the assistance of the political strategist. Every one of his arguments in this opinion in support of judicial review will be found anticipated in the debate on the Repeal Act. What Marshall did was to gather these arguments together, winnow them of their trivialities, inconsistencies, and irrelevancies, and compress the residuum into a compact presentation of the case which marches to its conclusion with all the precision of a demonstration from Euclid.

The salient passages of this part of his opinion are the following:

[In the United States] the powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To

what purpose are powers limited, and to what purpose is that limitation committed in writing if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on which they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested: that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

[If, then,] an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

[However, there are those who maintain] that courts must close their eyes on the Constitution, and see only the law. . . . This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual.

[Moreover,] the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey? There are many other parts of the Constitution which serve to illustrate this subject. . . . "No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act? . . .

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments are bound by that instrument.

There is not a false step in Marshall's argument. It is, for instance, not contended that the language of the Constitution establishes judicial review but only that it "confirms and strengthens the principle." Granting the finality of judicial decisions and that they may not be validly disturbed by legislative enactment, the argument is logically conclusive, whatever practical difficulties it may ignore.

Turning back to the case itself, we ought finally to note how Marshall utilized this opportunity to make manifest the newly found solidarity of the Court. For the first time in its history the Court was one voice, speaking through its Chief Justice the ineluctable decrees of the law. Ordinarily even Marshall would not have found this achievement an easy task, for there were difficult personalities



among his associates. He had in Adams's Cabinet demonstrated his faculty "of putting his ideas into the minds of others, unconsciously to them," and of this power he now made use, as well as of the advantage to be obtained from the impending common danger.

The case of *Marbury vs. Madison* was decided on February 24, 1803, and therefore fell between two other events which were immediately of almost as great importance in the struggle now waxing over the judiciary. The first of these was the impeachment of Judge Pickering of the New Hampshire District Court, which was suggested by the President on the 3d of February and voted by the House on the 18th of February; the other was an address which Justice Chase delivered on the 2d of May to a Baltimore grand jury, assailing the repeal of the Judiciary Act and universal suffrage and predicting the deterioration of "our republican Constitution . . . into a mobocracy, the worst of all possible governments."<sup>1</sup> Considering the fact that the President was still smarting from the Chief Justice's lash and also that Chase himself was more

<sup>1</sup> The account here given of Chase's trial is based on Charles Evans's shorthand *Report* (Baltimore, 1805), supplemented by J. Q. Adams's *Memoirs*.

heartily detested by the Republicans than any other member of the Supreme Bench, nothing could have been more untimely than this fresh judicial excursion into the field of "manners and morals," and partisan malice was naturally alert to interpret it as something even more offensive. The report soon came from Baltimore that Chase had deliberately assailed the Administration as "weak, pusillanimous, relaxed," and governed by the sole desire of continuing "in unfairly acquired power." But even before this intelligence arrived, Jefferson had decided that the opportunity afforded by Chase's outburst was too good a one to be neglected. Writing on the 13th of May to Nicholson of Maryland, who already had Pickering's impeachment in charge, the President inquired: "Ought this seditious and official attack on the principles of our Constitution and the proceedings of a State go unpunished?" But he straightway added: "The question is for your consideration; for myself it is better I should not interfere."

Pickering's trial began on March 2, 1804, and had a bearing on Chase's fate which at once became clear. The evidence against the New Hampshire judge showed intoxication and profanity on the bench and entire unfitness for office, but further

evidence introduced in his behalf proved the defendant's insanity; and so the question at once arose whether an insane man can be guilty of "high crimes and misdemeanors?" Greatly troubled by this new aspect of the case, the Senate none the less voted Pickering guilty "as charged," by the required two-thirds majority, though eight members refused to vote at all. But the exponents of "judge-breaking" saw only the action of the Senate and were blind to its hesitation. On the same day on which the Senate gave its verdict on Pickering, the House by a strictly partisan vote decreed Chase's impeachment.

The charges against Chase were finally elaborated in eight articles. The substance of the first six was that he had been guilty of "oppressive conduct" at the trials of John Fries and James Thompson Callender. The seventh charged him with having attempted at some time in 1800 to dragoon a grand jury at Newcastle, Delaware, into bringing forward an accusation of sedition against a local paper. These seven articles related therefore to transactions already four or five years old. The eighth article alone was based on the address at Baltimore, which it characterized as "an intemperate and inflammatory political harangue," delivered

“with intent to excite the fears and resentment . . . of the good people of Maryland against their State Government and Constitution, . . . and against the Government of the United States.”

But the charges framed against Chase revealed only imperfectly the animus which was now coming more and more to control the impeachers. Fortunately, however, there was one man among the President's advisers who was ready to carry the whole antijudicial program as far as possible. This uncompromising opponent was William Branch Giles, Senator from Virginia, whose views on the subject of impeachment were taken down by John Quincy Adams just as Chase's trial was about to open. Giles, according to this record, “treated with the utmost contempt the idea of an *independent judiciary* — said there was not a word about their independence in the Constitution. . . . The power of impeachment was given without limitation to the House of Representatives; the power of trying impeachment was given equally without limitation to the Senate; and if the Judges of the Supreme Court should dare, as they had done, to declare an act of Congress unconstitutional, or to send a mandamus to the Secretary of State, as they had done, it was the unreserved right of the House

of Representatives to impeach them, and that of the Senate to remove them, for giving such opinions, however, honest or sincere they may have been in entertaining them." For "impeachment was not a criminal prosecution, it was no prosecution at all." It only signified that the impeached officer held dangerous opinions and that his office ought to be in better hands. "I perceive," adds Adams, on his own account, "that the impeachment system is to be pursued, and the whole bench of the Supreme Court to be swept away, because *their offices are wanted*. And in the present state of things I am convinced it is as easy for Mr. John Randolph and Mr. Giles to do this as to say it."

The trial formally opened on January 2, 1805, though the taking of testimony did not begin until the 9th of February. A contemporary description of the Senate chamber shows that the apostles of Republican simplicity, with the pomp of the Warren Hastings trial still fresh in mind, were not at all averse to making the scene as impressive as possible by the use of several different colors of cloth: "On the right and left of the President of the Senate, and in a right line with his chair, there are two rows of benches with desks in front, and the whole front and seats covered with crimson cloth. . . .

A temporary semi-circular gallery, which consists of three ranges of benches, is elevated on pillars and the whole front and seats thereof covered with green cloth. . . . In this gallery ladies are accommodated. . . . On the right and left hand of the President . . . are two boxes of two rows of seats . . . that facing the President's right is occupied by the managers . . . that on the other side of the bar for the accused and his counsel . . . these boxes are covered with blue cloth." To preside over this scene of somewhat dubious splendor came Aaron Burr, Vice-President of the United States, straight from the dueling ground at Weehawken.

The occasion brought forward one of the most extraordinary men of the day, Luther Martin, Chase's friend and the leader of his counsel. Born at New Brunswick, New Jersey, in 1744, Martin graduated from Princeton in 1766, the first of a class of thirty-five, among whom was Oliver Ellsworth. Five years later he began to practice law on the Eastern Shore of Maryland and in the adjoining counties of Virginia, where he won an immediate success, especially in criminal cases. At a single term of court, out of thirty defendants he procured the acquittal of twenty-nine, while the

thirtieth, indicted for murder, was convicted of manslaughter. In 1805 Martin was the acknowledged head of the American Bar, but at the same time he was undoubtedly a drunkard and a spend-thrift. With an income of \$10,000 a year, he was always in need. His mediocre stature, thinning locks, and undistinguished features created an impression which was confirmed by his slovenly attire and ungrammatical speech, which seemed "shackled by a preternatural secretion of saliva." Here, indeed, for ugliness and caustic tongue was "the Thersites of the law." Yet once he was roused to action, his great resources made themselves apparent: a memory amounting to genius, a boyish delight in the rough-and-tumble of combat, a wealth of passion, kept in perfect curb till the enemy was already in rout before solid argument and then let loose with destroying effect. This child of nature was governed in his practice of the law less by retainers than by his personal loves and hatreds. Samuel Chase he loved and Thomas Jefferson he hated, and though his acquaintance with criminals had furnished him with a vituperative vocabulary of some amplitude, he considered no other damnation quite so scathing as to call a man "as great a scoundrel as Tom Jefferson."



The impeachers had no one whom they could pit against this "unprincipled and impudent Federalist bulldog," as Jefferson called him; and in other ways, too, from the first their lot was not easy. For one thing, they could not agree among themselves as to the proper scope of impeachment under the Constitution. Randolph, the leader of the House managers, and Campbell adhered in essence to Giles's theory. But Rodney and Nicholson, both much abler lawyers, openly disavowed such latitudinarian doctrine. In a general way, their view of the matter may be stated thus: Because judges of the United States are guaranteed continuance in office only during "good behavior," and because impeachment is the only method of removal recognized by the Constitution, the "high crimes and misdemeanors" for which impeachment is the constitutional resource must include all cases of willful misconduct in office, whether indictable or not. This seems sound theory and appears today to be established theory. But sound or not, the managers of the Republicans were not a unit in urging it, while their opponents put forward with confidence and unanimity the theory that "high crimes and misdemeanors" were always indictable offenses.

More calamitous still for the accusers of Chase

was the way in which, when the evidence began to come in, the case against him started crumpling at the corners. Lewis, who had been Fries's attorney and whose testimony they had chiefly relied upon to prove the judge's unfairness on that occasion, had not only acknowledged that his memory was "not very tenacious" after so great a lapse of time but had further admitted that he had really dropped the case because he thought it "more likely that the President would pardon him [Fries] after having been convicted without having counsel than if he had." Similarly Hay, whose repeated efforts to bring the question of the constitutionality of the Sedition Act before the jury had caused the rupture between court and counsel in Callender's case, owned that he had entertained "but little hopes of doing Callender any good" but had "wished to address the public on the constitutionality of the law." Sensations multiplied on every side. A man named Heath testified that Chase had told the marshal to strike all Democrats from the panel which was to try Callender; whereupon a second witness called to confirm this testimony stated facts which showed the whole story to be a deliberate fabrication. The story that Chase had attacked the Administration at Baltimore was also

substantially disproved by the managers' own witnesses. But the climax of absurdity was reached in the fifth and sixth articles of impeachment, which were based on the assumption that an act of Congress had required the procedure in Callender's case to be in accordance with the law of Virginia. In reply to this argument Chase's attorneys quickly pointed out that the statute relied upon applied only to actions between citizens of different States!

The final arguments began on the 20th of February. The first speech in behalf of Chase was delivered by Joseph Hopkinson, a young Philadelphia attorney, whose effort stirred the admiration of Federalists and Republicans alike. He dwelt upon "the infinite importance" of the implications of this case for the future of the Republic, contrasted the frivolity of the charges brought against Chase with the magnitude of the crimes of which Warren Hastings had been accused, and pointed out that, whereas in England only two judges had been impeached in half a century, in America, "boasting of its superior purity and virtue," seven judges had been prosecuted within two years. More loosely wrought, but not less effective was Martin's address, the superb climax of a remarkable forensic career! The accusation against Chase

he reduced to a charge of indecorum, and he was ready to admit that the manner of his friend "bore a stronger resemblance to that of Lord Thurlow than of Lord Chesterfield," but, said he, our judges ought not to be "like the gods of Epicurus lolling upon their beds of down, equally careless whether the laws of their country are obeyed or violated, instead of *actively* discharging their duties."

The closing argument, which fell to the managers, was assigned to Randolph. It was an unmitigated disaster for the cause in behalf of which it was pronounced. "I feel perfectly inadequate to the task of closing this important debate on account of a severe indisposition which I labor under," were Randolph's opening words, but even this prefatory apology gave little warning of the distressing exhibition of incompetence which was to follow. "On the reopening of the court," records John Quincy Adams in his *Memoirs*, "he [Randolph] began a speech of about two hours and a half, with as little relation to the subject-matter as possible . . . without order, connection, or argument; consisting altogether of the most hackneyed commonplaces of popular declamation, mingled up with panegyrics and invectives upon persons, with a few well-expressed ideas, a few striking figures,

much distortion of face and contortion of body, tears, groans and sobs, with occasional pauses for recollection, and continual complaints of having lost his notes." So ended the ambition of John Randolph of Roanoke to prove himself another Burke!

But while their frontal assault on the reason of the court was thus breaking down, the impeachers, led by the President, were attempting a flank movement on its virtue. They especially distrusted the "steadiness" of certain New England and New York Senators and hoped to reach the hearts of these gentlemen through Aaron Burr, the Vice-President. Burr had heretofore found himself vested with the rôle of Lucifer in the Republican Paradise. Now he found himself suddenly basking in a perpetual sunburst of smiles both from the great central luminary, Jefferson, and his paler satellites, Madison and Gallatin. Invitations to the President's dinners were soon followed by more substantial bribes. Burr's step-son became judge of the Superior Court at New Orleans; his brother-in-law, secretary to the Louisiana Territory; his intimate friend Wilkinson, its military commandant. Then Giles, whose view of impeachment left him utterly shameless in the matter, drew up and circulated in the Senate itself a petition to

the Governor of New Jersey asking him to quash the indictment for murder which the Bergen County grand jury had found against Burr as a result of the duel with Hamilton. At the same time, an act was passed giving the retiring Vice-President the franking privilege for life. In the debate Senator Wright of Maryland declared that dueling was justified by the example of David and Goliath and that the bill was opposed "only because *our* David had slain the Goliath of Federalism."

Whether Burr made any attempt to render the expected *quid pro quo* for these favors does not appear, but at least if he did, his efforts were fruitless. The vote on the impeachment of Chase was taken on the 1st of March, and the impeachers were crushingly defeated. On the first article they could muster only sixteen votes out of thirty-four; on the second, only ten; on the fifth, none; on the sixth, four. Even on the last article, where they made their best showing, they were still four votes short of the required constitutional majority. When the result of the last ballot was announced, Randolph rushed from the Senate chamber to the House to introduce a resolution proposing an amendment to the Constitution, requiring that judges of the United States "shall be removed by

the President on joint address of both Houses of Congress." At the same time Nicholson moved an amendment providing legislative recall for Senators. Thus exasperation was vented and no harm done.

Meanwhile word had come from Philadelphia that the impeachment of the State Supreme Court judges had also failed. Here, even more impressively than in the case of Chase, had been illustrated that solidarity of Bench and Bar which has ever since been such an influential factor in American government. The Pennsylvania judge-breakers, failing to induce a single reputable member of the Philadelphia bar to aid them, had been obliged to go to Delaware, whence they procured Cæsar A. Rodney, one of the House managers against Chase. The two impeachments were thus closely connected and their results were similar. In the first place, it was determined that impeachment was likely to be, in the petulant language of Jefferson, "a farce" not soon to be used again for partisan purposes. In the second place, it was probable that henceforth, in the Commonwealths as well as in the National Government, political power would be exercised subject to constitutional restraints applied judicially. In the third place, however, the



judges would henceforth have to be content with the possession of this magnificent prerogative and dispense with all judicial homilies on "manners and morals." It was a fair compromise and has on the whole proved a beneficial one.

## CHAPTER IV

### THE TRIAL OF AARON BURR

WHEN, on March 30, 1807, Colonel Aaron Burr, late Vice-President of the United States, was brought before Chief Justice Marshall in the Eagle Tavern at Richmond on the charge of treason, there began the greatest criminal trial in American history and one of the notable trials in the annals of the law.

“The Burr Conspiracy” still remains after a hundred years an unsolved enigma. Yet whether Burr actually planned treason against the United States in the year of grace 1806 is after all a question of somewhat restricted importance. The essential truth is that he was by nature an adventurer who, in the words of Hamilton, “believed all things possible to daring and energy,” and that in 1806 he was a bankrupt and a social outcast to boot. Whether, therefore, his grandiose project of an empire on the ruins of Spanish dominion in Mexico involved also

an effort to separate some part of the West from the Union is a question which, if it was ever definitely determined in Burr's own mind, was determined, we may be sure, quite independently of any moral or patriotic considerations.

Burr's activities after his term of public office ended in March, 1805, were devious, complicated, and purposely veiled, involving many men and spread over a large territory.<sup>1</sup> Near Marietta on an island in the Ohio River, Burr came upon Harman Blennerhassett, a genial Irishman living in a luxurious and hospitable mansion which was making a heavy drain upon his already diminished resources. Here Burr, by his charm of manner and engaging conversation, soon won from the simple Irishman his heart and his remaining funds. He also made the island both a convenient rendezvous for his adherents in his ambitious schemes and a starting point for his own extended expeditions, which took him during the latter part of this year to Natchez, Nashville, St. Louis, Vincennes, Cincinnati, and Philadelphia, and back to Washington.

In the summer of 1806 Burr turned westward

<sup>1</sup> An account of the Burr conspiracy will be found in *Jefferson and his Colleagues*, by Allen Johnson (in *The Chronicles of America*).

a second time and with the assistance of Blennerhassett he began military preparations on the latter's island for a mysterious expedition. On the 29th of July, Burr had dispatched a letter in cipher to Wilkinson, his most important confederate. The precise terms of this document we shall never know, but apparently it contained the most amazing claims of the successful maturing of Burr's scheme: "funds had been obtained," "English naval protection had been secured," "from five hundred to a thousand men" would be on the move down the Mississippi by the middle of November. Unfortunately for Burr, however, Wilkinson was far too expert in the usages of iniquity to be taken in by such audacious lying as this. He guessed that the enterprise was on the verge of collapse and forthwith made up his mind to abandon it.

Meanwhile exaggerated accounts of the size of Burr's following were filtering to Washington, together with circumstantial rumors of the disloyalty of his designs. Yet for weeks Jefferson did nothing, until late in November his alarm was aroused by a letter from Wilkinson, dated the 21st of October. On the 27th of November the President issued a proclamation calling upon all

good citizens to seize "sundry persons" who were charged with setting on foot a military expedition against Spain. Already Burr, realizing that the West was not so hot for disunion as perhaps he had supposed it to be, began to represent his project as a peaceful emigration to the Washita, a precaution which, however, came too late to allay the rising excitement of the people. Fearing the seizure of their equipment, thirty or forty of Burr's followers under the leadership of Blennerhassett left the island in four or five flatboats for New Orleans, on the night of the 10th of December, and a few days later were joined by Burr himself at the mouth of the Cumberland. When the little expedition paused near Natchez, on the 10th of January, Burr was confronted with a newspaper containing a transcription of his fatal letter to Wilkinson. A week later, learning that his former ally, Wilkinson, had now established a reign of terror at New Orleans directed against his followers, and feeling no desire to test the tender mercies of a court-martial presided over by his former associate, Burr surrendered himself into the custody of the acting Governor of Mississippi Territory. But the refusal of the territorial grand jury to indict him suggested the hope that he might

still escape from the reach of the law. He therefore plunged into the wilderness, headed for the Spanish border, and had all but reached his destination when he was recognized and recaptured at Wakefield, Alabama.

Owing to the peculiar and complicated circumstances which led up to it, Burr's case was from the outset imbued with factional and partisan politics of the most extreme kind. While the conspiracy was at its height, Jefferson, though emphatically warned, had refused to lend it any credence whatever; but when the danger was well over he had thrown the whole country into a panic, and had even asked Congress to suspend the writ of habeas corpus. The Federalists and the President's enemies within his own party, headed by the redoubtable Randolph, were instantly alert to the opportunity which Jefferson's inexplicable conduct afforded them. "The mountain had labored and brought forth a mouse," quoted the supercilious; the executive dragnet had descended to envelop the monster which was ready to split the Union or at least to embroil its relations with a friendly power, and had brought up — a few peaceful agriculturists! Nor was this the worst of the matter, contended these critics of the Administration, for

the real source of the peril had been the President's own action in assigning the command at New Orleans to Wilkinson, a pensioner of Spain, a villain "from the bark to the very core." Yet so far was the President from admitting this error that he now attributed the salvation of the country to "the soldier's honor" and "the citizen's fidelity" of this same Wilkinson. Surely, then, the real defendants before the bar of opinion were Thomas Jefferson and his precious ally James Wilkinson, not their harried and unfortunate victim, Aaron Burr!

The proceedings against Burr occupied altogether some seven months, during which the sleepy little town of Richmond became the cynosure of all eyes. So famous was the case that it brought thither of necessity or out of curiosity men of every rank and grade of life, of every species of renown. The prosecution was in charge of the United States District Attorney, George Hay — serious, humorless, faithful to Jefferson's interests, and absolutely devoid of the personal authority demanded by so grave a cause. He was assisted by William Wirt, already a brilliant lawyer and possessed of a dazzling elocution, but sadly lacking in the majesty of years. At the head and forefront of the



defense stood Burr himself, an unerring legal tactician, deciding every move of the great game, the stake of which for him was life itself. About him were gathered the ablest members of the Richmond bar: John Wickham, witty and ingenious, Edmund Randolph, ponderous and pontifical, Benjamin Botts, learned and sarcastic, while from Baltimore came Luther Martin to aid his "highly respected friend," to keep the political pot boiling, and eventually to fall desperately in love with Burr's daughter, the beautiful Theodosia. Among the 140 witnesses there were also some notable figures: William Eaton, the hero of Derne, whom Burr's codefendant, Blennerhassett, describes for us as "strutting about the streets under a tremendous hat, with a Turkish sash over colored clothes," and offering up, with his frequent libations in the taverns, "the copious effusions of his sorrows"; Commodore Truxton, the gallant commander of the *Constellation*; General Andrew Jackson, future President of the United States, but now a vehement declaimer of Burr's innocence — out of abundant caution for his own reputation, it may be surmised; Erick Bollmann, once a participant in the effort to release Lafayette from Olmutz and himself just now released from

duration vile on a writ of habeas corpus from the Supreme Court; Samuel Swartwout, another tool of Burr's, reserved by the same beneficent writ for a career of political roguery which was to culminate in his swindling the Government out of a million and a quarter dollars; and finally the bibulous and traitorous Wilkinson, "whose head" as he himself owned, "might err," but "whose heart could not deceive." Traveling by packet from New Orleans, this essential witness was heralded by the impatient prosecution, till at last he burst upon the stage with all the *éclat* of the hero in a melodrama — only to retire baffled and perplexed, his villainy guessed by his own partisans.

By the Constitution treason against the United States consists "only in levying war against them, or in adhering to their enemies, giving them aid and comfort," and no person may be convicted of it "unless on the testimony of two witnesses to the same overt act, or on confession in open court." The motion to commit Burr for treason thus raised at the outset the question whether in this case an "overt act" existed. Marshall, who held that no evidence had been shown to this effect, denied the motion, but consented to commit the prisoner on the lesser charge that he had attempted a

military expedition against Spain. As this was aailable offense, however, Burr was soon at liberty once more.

Nor was this the only respect in which the preliminary proceedings sounded a note of antagonism between the Chief Justice and the Administration which was to recur again and yet again in the months following. Only a few weeks earlier at Washington, Marshall had, though with some apparent reluctance, ordered the release of Bollmann and Swartwout, two of Burr's tools, from the custody of the Federal authorities. Alluding in his present opinion to his reason for his earlier action, he wrote: "More than five weeks have elapsed since the opinion of the Supreme Court has declared the necessity of proving the fact, if it exists. Why is it not proved? To the executive government is entrusted the important power of prosecuting those whose crimes may disturb the public repose or endanger its safety. It would be easy, in much less time than has intervened since Colonel Burr has been alleged to have assembled his troops, to procure affidavits establishing the fact."

This sharp criticism brought an equally sharp retort from Jefferson, to which was added a threat.

In a private letter of the 20th of April, the President said: "In what terms of decency can we speak of this? As if an express could go to Natchez or the mouth of the Cumberland and return in five weeks, to do which has never taken less than twelve! . . . But all the principles of law are to be perverted which would bear on the favorite offenders who endeavor to overturn this odious republic! . . . All this, however, will work well. The nation will judge both the offender and judges for themselves. . . . They will see then and amend the error in our Constitution which makes any branch independent of the nation. . . . If their [the judges] protection of Burr produces this amendment, it will do more good than his condemnation would have done." Already the case had taken on the color of a fresh contest between the President and the Chief Justice.

On the 22d of May the United States Court for the Fifth Circuit and the Virginia District formally convened, with Marshall presiding and Judge Griffin at his side. On the same day the grand jury was sworn, with John Randolph as foreman, and presently began taking testimony. Unluckily for the prosecution, the proceedings now awaited the arrival of Wilkinson and the delay was

turned to skillful use by the defense to embroil further the relations between the Chief Justice and the President. With this end in view, Burr moved on the 9th of June that a *subpœna duces tecum* issue to Jefferson requiring him to produce certain papers, including the famous cipher letter to Wilkinson. The main question involved, of course, was that of the right of the Court under any circumstances to issue a subpœna to the President, but the abstract issue soon became involved with a much more irritating personal one. "This," said Luther Martin, who now found himself in his element, "this is a peculiar case, sir. The President has undertaken to prejudge my client by declaring that 'of his guilt there is no doubt.' He has assumed to himself the knowledge of the Supreme Being himself and pretended to search the heart of my highly respected friend. He has proclaimed him a traitor in the face of the country which has rewarded him. He has let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend. And would this President of the United States, who has raised all this absurd clamor, pretend to keep back the papers which are wanted for this trial, where life itself is at stake?"

Wirt's answer to Martin was also a rebuke to the

Court. "Do they [the defense] flatter themselves," he asked, "that this court feel political prejudices which will supply the place of argument and innocence on the part of the prisoner? Their conduct amounts to an insinuation of the sort. But I do not believe it. . . . Sir, no man, foreigner or citizen, who hears this language addressed to the court, and received with all the complacency at least which silence can imply, can make any inference from it very honorable to the court." These words touched Marshall's conscience, as well they might. At the close of the day he asked counsel henceforth to "confine themselves to the point really before the court" — a request which, however, was by no means invariably observed through the following days.

A day or two later Marshall ruled that the subpoena should issue, holding that neither the personal nor the official character of the President exempted him from the operation of that constitutional clause which guarantees accused persons "compulsory process for obtaining witnesses" in their behalf. The demand made upon the President, said the Chief Justice, by his official duties is not an unremitting one, and, "if it should exist at the time when his attendance on a court is

required, it would be sworn on the return of the subpoena and would rather constitute a reason for not obeying the process of the court than a reason against its being issued." Jefferson, however, neither obeyed the writ nor swore anything on its return, though he forwarded some of the papers required to Hay, the district attorney, to be used as the latter might deem best. The President's argument was grounded on the mutual independence of the three departments of Government; and he asked whether the independence of the Executive could long survive "if the smaller courts could bandy him from pillar to post, keep him constantly trudging from North to South and East to West, and withdraw him entirely from his executive duties?" The President had the best of the encounter on all scores. Not only had Marshall forgotten for the nonce the doctrine he himself had stated in *Marbury vs. Madison* regarding the constitutional discretion of the Executive, but what was worse still, he had forgotten his own discretion on that occasion. He had fully earned his rebuff, but that fact did not appreciably sweeten it.

On the 24th of June the grand jury reported two indictments against Burr, one for treason and the other for misdemeanor. The former charged that



Burr, moved thereto "by the instigation of the devil," had on the 10th of December previous levied war against the United States at Blennerhassett's island, in the county of Wood, of the District of Virginia, and had on the day following, at the same place, set in motion a warlike array against the city of New Orleans. The latter charged that a further purpose of this same warlike array was an invasion of Mexico. Treason not being aailable offense, Burr had now to go to jail, but, as the city jail was alleged to be unhealthful, the Court allowed him to be removed to quarters which had been proffered by the Governor of the State in the penitentiary just outside the city. Burr's situation here, writes his biographer, "was extremely agreeable. He had a suite of rooms in the third story, extending one hundred feet, where he was allowed to see his friends without the presence of a witness. His rooms were so thronged with visitors at times as to present the appearance of a levee. Servants were continually arriving with messages, notes, and inquiries, bringing oranges, lemons, pineapples, raspberries, apricots, cream, butter, ice, and other articles — presents from the ladies of the city. In expectation of his daughter's arrival, some of his friends in town provided

a house for her accommodation. The jailer, too, was all civility.”<sup>1</sup> Little wonder that such goings-on are said to have “filled the measure of Jefferson’s disgust.”

The trial itself opened on Monday, the 3d of August. The first business in hand was to get a jury which would answer to the constitutional requirement of impartiality — a task which it was soon discovered was likely to prove a difficult one. The original panel of forty-eight men contained only four who had not expressed opinions unfavorable to the prisoner, and of these four all but one admitted some degree of prejudice against him. These four were nevertheless accepted as jurors. A second panel was then summoned which was even more unpromising in its make-up, and Burr’s counsel began hinting that the trial would have to be quashed, when Burr himself arose and offered to select eight out of the whole *venire* to add to the four previously chosen. The offer was accepted, and notwithstanding that several of the jurors thus obtained had publicly declared opinions hostile to the accused, the jury was sworn in on the 17th of August.

<sup>1</sup> Parton’s *Life and Times of Aaron Burr* (13th Edition, N. Y., 1860), p. 479.

At first glance Burr's concession in the selecting of a jury seems extraordinary. But then, why should one so confident of being able to demonstrate his innocence fear prejudice which rested on no firmer basis than ignorance of the facts? This reflection, however, probably played small part in Burr's calculations, for already he knew that if the contemplated strategy of his counsel prevailed the case would never come before the jury.

The first witness called by the prosecution was Eaton, who was prepared to recount the substance of numerous conversations he had held with Burr in Washington in the winter of 1805-6, in which Burr had gradually unveiled to him the treasonable character of his project. No sooner, however, was Eaton sworn than the defense entered the objection that his testimony was not yet relevant, contending that in a prosecution for treason the great material fact on which the merits of the entire controversy pivots was the overt act, which must be "*an open act of war*"; just as in a murder trial the fact of the killing, the *corpus delicti*, must be proved before any other testimony was relevant, so in the pending prosecution, said they, no testimony was admissible until the overt act

had been shown in the manner required by the Constitution.

The task of answering this argument fell to Wirt, who argued, and apparently with justice, that the prosecution was free to introduce its evidence in any order it saw fit, provided only that the evidence was relevant to the issue raised by the indictment, and that if an overt act was proved "in the course of the whole evidence," that would be sufficient. The day following the Court read an opinion which is a model of ambiguous and equivocal statement, but the purport was fairly clear: for the moment the Court would not interfere, and the prosecution was free to proceed as it thought best, with the warning that the Damocles sword of "irrelevancy" was suspended over its head by the barest thread and might fall at any moment.

For the next two days the legal battle was kept in abeyance while the taking of testimony went forward. Eaton was followed on the stand by Commodore Truxton, who stated that in conversation with him Burr had seemed to be aiming only at an expedition against Mexico. Then came General Morgan and his two sons, who asserted their belief in the treasonable character of Burr's designs.

Finally a series of witnesses, the majority of them servants of Blennerhassett, testified that on the evening of December 10, 1806, Burr's forces had assembled on the island.

This line of testimony concluded, the prosecution next indicated its intention of introducing evidence to show Burr's connection with the assemblage on the island, when the defense sprang the *coup* it had been maturing from the outset. Pointing out the notorious fact that on the night of the 10th of December Burr had not been present at the island but had been two hundred miles away in Kentucky, they contended that, under the Constitution, the assemblage on Blennerhassett's island could not be regarded as his act, even granting that he had advised it, for, said they, advising war is one thing but levying it is quite another. If this interpretation was correct, then no overt act of levying war, either within the jurisdiction of the Court or stated in the indictment, had been, or could be, shown against Burr. Hence the taking of evidence — if not the cause itself, indeed — should be discontinued.

The legal question raised by this argument was the comparatively simple one whether the constitutional provision regarding treason was to be

interpreted in the light of the Common Law doctrine that "in treason all are principals." For if it were to be so interpreted and if Burr's connection with the general conspiracy culminating in the assemblage was demonstrable by any sort of legal evidence, then the assemblage was his act, his overt act, proved moreover by thrice the two witnesses constitutionally required! Again it fell to Wirt to represent the prosecution, and he discharged his task most brilliantly. He showed beyond peradventure that the Common Law doctrine was grounded upon unshakable authority; that, considering the fact that the entire phraseology of the constitutional clause regarding treason comes from an English statute of Edward III's time, it was reasonable, if not indispensable, to construe it in the light of the Common Law; and that, certainly as to a procurer of treason, such as Burr was charged with being, the Common Law doctrine was the only just doctrine, being merely a reaffirmation of the even more ancient principle that "what one does through another, he does himself."

In elaboration of this last point Wirt launched forth upon that famous passage in which he contrasted Burr and the pathetic victim of his conspiracy:

Who [he asked] is Blennerhassett? A native of Ireland, a man of letters, who fled from the storms of his own country to find quiet in ours. . . . Possessing himself of a beautiful island in the Ohio he rears upon it a palace and decorates it with every romantic embellishment of fancy. [Then] in the midst of all this peace, this innocent simplicity, this pure banquet of the heart, the destroyer comes . . . to change this paradise into a hell. . . . By degrees he infuses [into the heart of Blennerhassett] the poison of his own ambition. . . . In a short time the whole man is changed, and every object of his former delight is relinquished. . . . His books are abandoned. . . . His enchanted island is destined soon to relapse into a wilderness; and in a few months we find the beautiful and tender partner of his bosom, whom he lately 'permitted not the winds of summer to visit too roughly,' we find her shivering at midnight on the winter banks of the Ohio and mingling her tears with the torrents that froze as they fell. Yet this unfortunate man, thus ruined, and undone and made to play a subordinate part in this grand drama of guilt and treason, this man is to be called the principal offender, while he by whom he was thus plunged in misery is comparatively innocent, a mere accessory! Is this reason? Is it law? Is it humanity? Sir, neither the human heart nor the human understanding will bear a perversion so monstrous and absurd!

But there was one human heart, one human understanding — and that, in ordinary circumstances, a very good one — which was quite willing to shoulder just such a monstrous perversion, or



at least its equivalent, and that heart was John Marshall's. The discussion of the motion to arrest the evidence continued ten days, most of the time being occupied by Burr's attorneys.<sup>1</sup> Finally, on the last day of the month, the Chief Justice handed down an opinion accepting practically the whole contention of Burr's attorneys, but offering a totally new set of reasons for it. On the main question at issue, namely, whether under the Constitution all involved in a treasonable enterprise are principals, Marshall pretended not to pass; but in fact he rejected the essential feature of the Common Law doctrine, namely, the necessary legal presence at the scene of action of all parties to the conspiracy. The crux of his argument he embodied in the following statement: "If in one case the

<sup>1</sup> A recurrent feature of their arguments was a denunciation of "constructive treason." But this was mere declamation. Nobody was charging Burr with any sort of treason except that which is specifically defined by the Constitution itself, namely, the levying of war against the United States. The only question at issue was as to the method of proof by which this crime may be validly established in the case of one accused of procuring treason. There was also much talk about the danger and injustice of dragging a man from one end of the country to stand trial for an act committed at the other end of it. The answer was that, if the man himself procured the act or joined others in bringing it about, he ought to stand trial where the act occurred. This same "injustice" may happen today in the case of murder!

presence of the individual make the guilt of the [treasonable] assemblage *his* guilt, and in the other case, the procurement by the individual make the guilt of the [treasonable] assemblage, his guilt, then presence and procurement are equally component parts of the overt act, and equally require two witnesses." Unfortunately for this argument, the Constitution does not require that the "component parts" of the overt act be proved by two witnesses, but only that the overt act — the *corpus delicti* — be so proved; and for the simple reason that, when by further evidence any particular individual is connected with the treasonable combination which brought about the overt act, that act, assuming the Common Law doctrine, becomes his act, and he is accordingly responsible for it at the place where it occurred. Burr's attorneys admitted this contention unreservedly. Indeed, that was precisely the reason why they had opposed the Common Law doctrine.

Marshall's effort to steer between this doctrine and its obvious consequences for the case before him placed him, therefore, in the curious position of demanding that two overt acts be proved each by two witnesses. But if two, why not twenty? For it must often happen that the traitor's connection

with the overt act is demonstrable not by a single act but a series of acts. Furthermore, in the case of procurers of treason, this connection will ordinarily not appear in overt acts at all but, as in Burr's own case, will be covert. Can it be, then, that the Constitution is chargeable with the absurdity of regarding the procurers of treason as traitors and yet of making their conviction impossible? The fact of the matter was that six months earlier, before his attitude toward Burr's doings had begun to take color from his hatred and distrust of Jefferson, Marshall had entertained no doubt that the Common Law doctrine underlay the constitutional definition of treason. Speaking for the Supreme Court in the case of Bollmann and Swartwout, he had said: "It is not the intention of the Court to say that no individual can be guilty of this crime who has not appeared in arms against his country; on the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered traitors." Marshall's effort to square this previous opinion

with his later position was as unconvincing as it was labored.<sup>1</sup>

Burr's attorneys were more prudent: they dismissed Marshall's earlier words outright as *obiter dicta* — and erroneous at that! Nevertheless when, thirty years later, Story, Marshall's friend and pupil, was in search of the best judicial definition of treason within the meaning of the Constitution, he selected this sentence from the case of Bollmann and Swartwout and passed by the elaborate opinion in Burr's case in significant silence. But reputation is a great magician in transmuting heresy into accepted teaching. Posthumously Marshall's opinion has attained a rank and authority with the legal profession that it never enjoyed in his own time. Regarding it, therefore, as today established doctrine, we may say that it has quite reversed the relative importance of conspiracy and overt act where the treason is by levying

<sup>1</sup> The way in which Marshall proceeded to do this was to treat the phrase "perform a part" as demanding "a levying of war" on the part of the performer. (Robertson, *Reports*, vol. II, p. 438.) But this explanation will not hold water. For what then becomes of the phrase "scene of action" in the passage just quoted? What is the difference between the part to be performed "however minute," and the "action" from which the performer may be "however remote"? It is perfectly evident that the "action" referred to is the assemblage which is regarded as the overt act of war, and that the "part however minute" is something very different.

war. At the Common Law, and in the view of the framers of the Constitution, the importance of the overt act of war was to make the conspiracy visible, to put its existence beyond surmise. By Marshall's view each traitor is chargeable only with his own overt acts, and the conspiracy is of importance merely as showing the intention of such acts. And from this it results logically, as Marshall saw, though he did not venture to say so explicitly, that the procurer of treason is not a traitor unless he has also participated personally in an overt act of war. As Wirt very justifiably contended, such a result is "monstrous," and, what is more, it has not been possible to adhere to it in practice. In recent legislation necessitated by the Great War, Congress has restored the old Common Law view of treason but has avoided the constitutional difficulty by labeling the offense "Espionage." Indeed, the Espionage Act of June 15, 1917, scraps Marshall's opinion pretty completely.<sup>1</sup>

On the day following the reading of Marshall's

<sup>1</sup> See especially Title I, Section 4, of the Act. For evidence of the modern standing of Marshall's opinion, see the chorus of approval sounded by the legal fraternity in Dillon's three volumes. In support of the Common Law doctrine, see the authorities cited in 27 *Yale Law Journal*, p. 342 and footnotes; the chapter on Treason in Simon Greenleaf's well-known *Treatise on the Law of Evidence*; United States *vs. Mitchell*, 2 Dallas, 348; and *Druecker vs. Salomon*, 21 Wis., 621.

opinion, the prosecution, unable to produce two witnesses who had actually *seen* Burr procure the assemblage on the island, abandoned the case to the jury. Shortly thereafter the following verdict was returned: "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty." At the order of the Chief Justice this Scotch verdict was entered on the records of the court as a simple Not Guilty.

Marshall's conduct of Burr's trial for treason is the one serious blemish in his judicial record, but for all that it was not without a measure of extenuation. The President, too, had behaved deplorably and, feeling himself on the defensive, had pressed matters with most unseemly zeal, so that the charge of political persecution raised by Burr's attorneys was, to say the least, not groundless. Furthermore, in opposing the President in this matter, Marshall had shown his usual political sagacity. Had Burr been convicted, the advantage must all have gone to the Administration. The only possible credit the Chief Justice could extract from the case would be from assuming that lofty tone of calm, unmoved impartiality of which Marshall was such a master — and never more than on

this occasion — and from setting himself sternly against popular hysteria. The words with which his opinion closes have been often quoted:

Much has been said in the course of the argument on points on which the Court feels no inclination to comment particularly, but which may, perhaps not improperly receive some notice.

That this Court dare not usurp power is most true.

That this Court dare not shrink from its duty is not less true.

No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the popular subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.

One could not require a better illustration of that faculty of “apparently deep self-conviction” which Wirt had noted in the Chief Justice.

Finally, it must be owned that Burr’s case offered Marshall a tempting opportunity to try out the devotion of Republicans to that ideal of judicial deportment which had led them so vehemently to criticize Justice Chase and to charge him with



being "oppressive," with refusing to give counsel for defense an opportunity to be heard, with transgressing the state law of procedure, with showing too great liking for Common Law ideas of sedition, with setting up the President as a sort of monarch beyond the reach of judicial process. Marshall's conduct of Burr's trial now exactly reversed every one of these grounds of complaint. Whether he intended it or not, it was a neat turning of the tables.

But Jefferson, who was at once both the most theoretical and the least logical of men, was of course hardly prepared to see matters in that light. As soon as the news reached him of Burr's acquittal, he ordered Hay to press the indictment for misdemeanor — not for the purpose of convicting Burr, but of getting the evidence down in a form in which it should be available for impeachment proceedings against Marshall. For some weeks longer, therefore, the Chief Justice sat listening to evidence which was to be used against himself. But the impeachment never came, for a chain is only as strong as its weakest link, and the weakest link in the combination against the Chief Justice was a very fragile one indeed — the iniquitous Wilkinson. Even the faithful and melancholy Hay

finally abandoned him. "The declaration which I made in court in his favor some time ago," he wrote the President, "was precipitate. . . . My confidence in him is destroyed. . . . I am sorry for it, on his account, on the public account, and because you have expressed opinions in his favor." It was obviously impossible to impeach the Chief Justice for having prevented the hanging of Aaron Burr on the testimony of such a miscreant.

Though the years immediately following the Burr trial were not a time of conspicuous activity for Marshall, they paved the way in more than one direction for his later achievement. Jefferson's retirement from the Presidency at last relieved the Chief Justice from the warping influence of a hateful personal contest and from anxiety for his official security. Jefferson's successors were men more willing to identify the cause of the Federal Judiciary with that of national unity. Better still, the War of 1812 brought about the demise of the Federalist party and thus cleared the Court of every suspicion of partisan bias. Henceforth the great political issue was the general one of the nature of the Union and the Constitution, a field in which Marshall's talent for debate made him master.

In the meantime the Court was acquiring that personnel which it was to retain almost intact for nearly twenty years; and, although the new recruits came from the ranks of his former party foes, Marshall had little trouble in bringing their views into general conformity with his own constitutional creed. Nor was his triumph an exclusively personal one. He was aided in very large measure by the fact that the war had brought particularism temporarily into discredit in all sections of the country. Of Marshall's associates in 1812, Justice Washington alone had come to the bench earlier, yet he was content to speak through the mouth of his illustrious colleague, save on the notable occasion when he led the only revolt of a majority of the Court from the Chief Justice's leadership in the field of Constitutional Law.<sup>1</sup> Johnson of South Carolina, a man of no little personal vanity, affected a greater independence, for which he was on one occasion warmly congratulated by Jefferson; yet even his separate opinions, though they sometimes challenge Marshall's more sweeping premises and bolder method of reasoning, are after all mostly concurring ones. Marshall's really invaluable

<sup>1</sup> This was in the case of *Ogden vs. Saunders*, 12 Wheaton, 213 (1827).

aid among his associates was Joseph Story, who in 1811, at the age of thirty-two, was appointed by Madison in succession to Cushing. Still immature, enthusiastically willing to learn, warmly affectionate, and with his views on constitutional issues as yet unformed, Story fell at once under the spell of Marshall's equally gentle but vastly more resolute personality; and the result was one of the most fruitful friendships of our history. Marshall's "original bias," to quote Story's own words, "as well as the choice of his mind, was to general principles and comprehensive views, rather than to technical or recondite learning." Story's own bias, which was supported by his prodigious industry, was just the reverse. The two men thus supplemented each other admirably. A tradition of some venerability represents Story as having said that Marshall was wont to remark: "Now Story, that is the law; you find the precedents for it." Whether true or not, the tale at least illustrates the truth. Marshall owed to counsel a somewhat similar debt in the way of leading up to his decisions, for, as Story points out, "he was solicitous to hear arguments and not to decide cases without them, nor did any judge ever profit more by them." But in the field of Constitutional Law, at

least, Marshall used counsel's argument not so much to indicate what his own judicial goal ought to be as to discover the best route thereto — often, indeed, through the welcome stimulus which a clash of views gave to his reasoning powers.

Though the wealth of available legal talent at this period was impressively illustrated in connection both with Chase's impeachment and with Burr's trial, yet on neither of these occasions appeared William Pinkney of Maryland, the attorney to whom Marshall acknowledged his greatest indebtedness, and who was universally acknowledged to be the leader of the American Bar from 1810 until his death twelve years later. Besides being a great lawyer, Pinkney was also a notable personality, as George Ticknor's sketch of him as he appeared before the Supreme Court in 1815 goes to prove:

You must imagine, if you can, a man formed on nature's most liberal scale, who at the age of 50 is possessed with the ambition of being a pretty fellow, wears corsets to diminish his bulk, uses cosmetics, as he told Mrs. Gore, to smooth and soften a skin growing somewhat wrinkled and rigid with age, dresses in a style which would be thought foppish in a much younger man. You must imagine such a man standing before the gravest tribunal in the land, and engaged in causes of the deepest

moment; but still apparently thinking how he can declaim like a practised rhetorician in the London Cockpit, which he used to frequent. Yet you must, at the same time, imagine his declamation to be chaste and precise in its language and cogent, logical and learned in its argument, free from the artifice and affectation of his manner, and in short, opposite to what you might fairly have expected from his first appearance and tones. And when you have compounded these inconsistencies in your imagination, and united qualities which on common occasions nature seems to hold asunder, you will, perhaps, begin to form some idea of what Mr. Pinkney is.

Such was the man whom Marshall, Story, and Taney all considered the greatest lawyer who had ever appeared before the Supreme Court.

At the close of the War of 1812, Marshall, though he had decided many important questions of International Law,<sup>1</sup> nevertheless found himself only at the threshold of his real fame. Yet even thus early he had indicated his point of view. Thus in the case of the United States *vs.* Peters,<sup>2</sup> which was decided in 1809, the question before the Court was whether a mandamus should issue to the United States District Judge of Pennsylvania ordering him to enforce, in the face of the opposition of

<sup>1</sup> Two famous decisions of Marshall's in this field are those in the Schooner *Exchange vs. McFaddon et al*, 7 Cranch, 116, and the case of the *Nereide*, 9 *ib.*, 388.

<sup>2</sup> 5 Cranch, 136.

the state Government, a decision handed down in a prize case more than thirty years before by the old Committee of Appeals of the Continental Congress. Marshall answered the question affirmatively, saying: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."

Marshall's decision evoked a warm protest from the Pennsylvania Legislature and led to a proposal of amendment to the Constitution providing "an impartial tribunal" between the General Government and the States; and these expressions of dissent in turn brought the Virginia Assembly to the defense of the Supreme Court.

The commission to whom was referred the communication of the governor of Pennsylvania [reads the Virginia document] . . . are of the opinion that a tribunal is already provided by the Constitution of the United States, *to wit*; the Supreme Court, more eminently qualified from their habits and duties, from the mode of their selection, and from the tenure of their offices, to decide the disputes aforesaid in an enlightened and impartial manner than any other tribunal which could be created.



The members of the Supreme Court are selected from those in the United States who are most celebrated for virtue and legal learning. . . . The duties they have to perform lead them necessarily to the most enlarged and accurate acquaintance with the jurisdiction of the federal and several State courts together, and with the admirable symmetry of our government. The tenure of their offices enables them to pronounce the sound and correct opinions they have formed, without fear, favor or partiality.

Was it coincidence or something more that during Marshall's incumbency Virginia paid her one and only tribute to the impartiality of the Supreme Court while Burr's acquittal was still vivid in the minds of all? Or was it due to the fact that "the Great Lama of the Little Mountain" — to use Marshall's disrespectful appellation for Jefferson — had not yet converted the Virginia Court of Appeals into the angry oracle of his own unrelenting hatred of the Chief Justice? Whatever the reason, within five years Virginia's attitude had again shifted, and she had become once more what she had been in 1798-99, the rallying point of the forces of Confederation and State Rights.

## CHAPTER V

### THE TENETS OF NATIONALISM

“JOHN MARSHALL stands in history as one of that small group of men who have founded States. He was a nation-maker, a state-builder. His monument is in the history of the United States and his name is written upon the Constitution of his country.” So spoke Senator Lodge, on John Marshall Day, February 4, 1901. “I should feel a . . . doubt,” declared Justice Holmes on the same occasion, “whether, after Hamilton and the Constitution itself, Marshall’s work proved more than a strong intellect, a good style, personal ascendancy in his court, courage, justice, and the convictions of his party.” Both these divergent estimates of the great Chief Justice have their value. It is well to be reminded that Marshall’s task lay within the four corners of the Constitution, whose purposes he did not originate, especially since no one would have been quicker than himself to

disown praise implying anything different. None the less it was no ordinary skill and courage which, assisted by great office, gave enduring definition to the purposes of the Constitution at the very time when the whole trend of public opinion was setting in most strongly against them. It must not be forgotten that Hamilton, whose name Justice Holmes invokes in his somewhat too grudging encomium of Marshall, had pronounced the Constitution "a frail and worthless fabric."

Marshall's own outlook upon his task sprang in great part from a profound conviction of calling. He was thoroughly persuaded that he knew the intentions of the framers of the Constitution — the intentions which had been wrought into the instrument itself — and he was equally determined that these intentions should prevail. For this reason he refused to regard his office merely as a judicial tribunal; it was a platform from which to promulgate sound constitutional principles, the very cathedra indeed of constitutional orthodoxy. Not one of the cases which elicited his great opinions but might easily have been decided on comparatively narrow grounds in precisely the same way in which he decided it on broad, general principles, but with the probable result that it would never

again have been heard of outside the law courts. To take a timid or obscure way to a merely tentative goal would have been at variance equally with Marshall's belief in his mission and with his instincts as a great debater. Hence he forged his weapon — the *obiter dictum* — by whose broad strokes was hewn the highroad of a national destiny.

Marshall's task naturally was not performed *in vacuo*: he owed much to the preconceptions of his contemporaries. His invariable quest, as students of his opinions are soon aware, was for the axiomatic, for absolute principles, and in this inquiry he met the intellectual demands of a period whose first minds still owned the sway of the syllogism and still loved what Bacon called the "spacious liberty of generalities." In Marshall's method — as in the older syllogistic logic, whose phraseology begins to sound somewhat strange to twentieth century ears — the essential operation consisted in eliminating the "accidental" or "irrelevant" elements from the "significant" facts of a case, and then recognizing that this particular case had been foreseen and provided for in a general rule of law. Proceeding in this way Marshall was able to build up a body of thought the internal consistency of which, even when it did not convince, yet

baffled the only sort of criticism which contemporaries were disposed to apply. Listen, for instance, to the despairing cry of John Randolph of Roanoke: "All wrong," said he of one of Marshall's opinions, "all wrong, but no man in the United States can tell why or wherein."

Marshall found his first opportunity to elaborate the tenets of his nationalistic creed in the case of *M'Culloch vs. Maryland*, which was decided at the same term with the Dartmouth College case and that of *Sturges vs. Crowninshield* — the greatest six weeks in the history of the Court. The question immediately involved was whether the State of Maryland had the right to tax the notes issued by the branch which the Bank of the United States had recently established at Baltimore. But this question raised the further one whether the United States had in the first place the right to charter the Bank and to authorize it to establish branches within the States. The outcome turned on the interpretation to be given the "necessary and proper" clause of the Constitution.

The last two questions were in 1819 by no means novel. In the *Federalist* itself Hamilton had boldly asked, "Who is to judge of the necessity and propriety of the laws to be passed for executing the

powers of the Union?" and had announced that "the National Government, like every other, must judge in the first instance, of the proper exercise of its powers, and its constituents in the last," a view which seems hardly to leave room even for judicial control. Three years later as Secretary of the Treasury, Hamilton had brought forward the proposal which soon led to the chartering of the Bank of 1791. The measure precipitated the first great discussion over the interpretation of the new Constitution. Hamilton owned that Congress had no specifically granted power to charter a bank but contended that such an institution was a "necessary and proper" means for carrying out certain of the enumerated powers of the National Government such, for instance, as borrowing money and issuing a currency. For, said he in effect, "necessary and proper" signify "convenient," and the clause was intended to indicate that the National Government should enjoy a wide range of choice in the selection of means for carrying out its enumerated powers. Jefferson, on the other hand, maintained that the "necessary and proper" clause was a restrictive clause, meant to safeguard the rights of the States, that a law in order to be "necessary and proper" must be both "necessary"

*and* “proper,” and that both terms ought to be construed narrowly. Jefferson’s opposition, however, proved unavailing, and the banking institution which was created continued till 1811 without its validity being once tested in the courts.

The second Bank of the United States, whose branch Maryland was now trying to tax, received its charter in 1816 from President Madison. Well might John Quincy Adams exclaim that the “Republicans had outfederalized the Federalists!” Yet the gibe was premature. The country at large was as yet blind to the responsibilities of nationality. That vision of national unity which indubitably underlies the Constitution was after all the vision of an aristocracy conscious of a solidarity of interests transcending state lines. It is equally true that until the Civil War, at the earliest, the great mass of Americans still felt themselves to be first of all citizens of their particular States. Nor did this individualistic bias long remain in want of leadership capable of giving it articulate expression. The amount of political talent which existed within the State of Virginia alone in the first generation of our national history is amazing to contemplate, but this talent unfortunately exhibited one most damaging blemish. The intense individualism



of the planter-aristocrat could not tolerate in any possible situation the idea of a control which he could not himself ultimately either direct or reject. In the Virginia and Kentucky resolutions of 1798 and 1799, which regard the Constitution as a compact of sovereign States and the National Government merely as their agent, the particularistic outlook definitely received a constitutional creed which in time was to become, at least in the South, a gloss upon the Constitution regarded as fully as authoritative as the original instrument. This recognition of state sovereignty was, indeed, somewhat delayed by the federalization of the Republican party in consequence of the capture of the National Government by Virginia in 1800. But in 1819 the march toward dissolution and civil war which had begun at the summons of Jefferson was now definitely resumed. This was the year of the congressional struggle over the admission of Missouri, the most important result of which was the discovery by the slave owners that the greatest security of slavery lay in the powers of the States and that its greatest danger lay in those of the National Government. Henceforth the largest property interest of the country stood almost solidly behind State Rights.

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It was at this critical moment that chance presented Marshall with the opportunity to place the opposing doctrine of nationalism on the high plane of judicial decision. The arguments in the Bank case,<sup>1</sup> which began on February 22, 1819, and lasted nine days, brought together a "constellation of lawyers" such as had never appeared before in a single case. The Bank was represented by Pinkney, Webster, and Wirt; the State, by Luther Martin, Hopkinson, and Walter Jones of the District of Columbia bar. In arguing for the State, Hopkinson urged the restrictive view of the "necessary and proper" clause and sought to reduce to an absurdity the doctrine of "implied rights." The Bank, continued Hopkinson, "this creature of construction," claims by further implication "the right to enter the territory of a State without its consent" and to establish there a branch; then, by yet another implication, the branch claims exemption from taxation. "It is thus with the famous fig-tree of India, whose branches shoot from the trunk to a considerable distance, then drop to the earth, where they take root and become trees from which also other branches shoot . . . , until gradually a vast surface is covered, and everything perishes

<sup>1</sup> *M'Culloch vs. Maryland* (1819), 4 Wheaton, 316.

in the spreading shade." But even granting that Congress did have the right to charter the Bank, still that fact would not exempt the institution from taxation by any State within which it held property. "The exercise of the one sovereign power cannot be controlled by the exercise of the other."

On the other side, Pinkney made the chief argument in behalf of the Bank. "Mr. Pinkney," says Justice Story, "rose on Monday to conclude the argument; he spoke all that day and yesterday and will probably conclude to-day. I never in my whole life heard a greater speech; it was worth a journey from Salem to hear it; his elocution was excessively vehement; but his eloquence was overwhelming. His language, his style, his figures, his argument, were most brilliant and sparkling. He spoke like a great statesman and patriot and a sound constitutional lawyer. All the cobwebs of sophistryship and metaphysics about State Rights and State Sovereignty he brushed away with a mighty besom."

Pinkney closed on the 3d of March, and on the 6th Marshall handed down his most famous opinion. He condensed Pinkney's three-day argument into a pamphlet which may be easily read by the instructed layman in half an hour, for, as is

invariably the case with Marshall, his condensation made for greater clarity. In this opinion he also gives evidence, in their highest form, of his other notable qualities as a judicial stylist: his "tiger instinct for the jugular vein"; his rigorous pursuit of logical consequences; his power of stating a case, wherein he is rivaled only by Mansfield; his scorn of the qualifying "but's," "if's," and "though's"; the pith and balance of his phrasing, a reminiscence of his early days with Pope; the developing momentum of his argument; above all, his audacious use of the *obiter dictum*. Marshall's later opinion in *Gibbons vs. Ogden* is, it is true, in some respects a greater intellectual performance, but it does not equal this earlier opinion in those qualities of form which attract the amateur and stir the admiration of posterity.

At the very outset of his argument in the *Bank* case Marshall singled out the question the answer to which must control all interpretation of the Constitution: Was the Constitution, as contended by counsel for Maryland, "an act of sovereign and independent States" whose political interests must be jealously safeguarded in its construction, or was it an emanation from the American people and designed for their benefit? Marshall answered

that the Constitution, by its own declaration, was "ordained and established" in the name of the people, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and their posterity." Nor did he consider the argument "that the people had already surrendered all their powers to the State Sovereignities and had nothing more to give," a persuasive one, for "surely, the question whether they may resume and modify the power granted to the government does not remain to be settled in this country. Much more might the legitimacy of the General Government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by them." "The Government of the Union, then," Marshall proceeded, "is emphatically . . . a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised on them, and for their benefit." And what was the nature of this Government? "If any one proposition could command the universal assent of mankind we might expect it would be this: that the government of the Union, though

limited in its powers, is supreme within the sphere of its action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all and acts for all." However the question had not been left to reason. "The people have in express terms decided it by saying: 'This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land.'"

But a Government which is supreme must have the right to choose the means by which to make its supremacy effective; and indeed, at this point again the Constitution comes to the aid of reason by declaring specifically that Congress may make all laws "necessary and proper" for carrying into execution any of the powers of the General Government. Counsel for Maryland would read this clause as limiting the right which it recognized to the choice only of such means of execution as are indispensable; they would treat the word "necessary" as controlling the clause and to this they would affix the word "absolutely." "Such is the character of human language," rejoins the Chief Justice, "that no word conveys to the mind in all situations, one single definite idea," and the

word "necessary," "like others, is used in various senses," so that its context becomes most material in determining its significance.

And what is its context on this occasion? "The subject is the execution of those great powers on which the welfare of a nation essentially depends." The provision occurs "in a Constitution intended to endure for ages to come and consequently to be adapted to the various crises of human affairs." The purpose of the clause therefore is not to impair the right of Congress "to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the Government," but rather "to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble. . . . Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

But was the Act of Maryland which taxed the Bank in conflict with the Act of Congress which established it? If so, must the State yield to



Congress? In approaching this question Marshall again laid the basis for as sweeping a decision as possible. The terms in which the Maryland statute was couched indicated clearly that it was directed specifically against the Bank, and it might easily have been set aside on that ground. But Marshall went much further and laid down the principle that the instrumentalities of the National Government are never subject to taxation by the States in any form whatsoever, and for two reasons. In the first place, "those means are not given by the people of a particular State . . . but by the people of all the States. They are given by all for the benefit of all," and owe their presence in the State not to the State's permission but to a higher authority. The State of Maryland therefore never had the power to tax the Bank in the first place. Yet waiving this theory, there was, in the second place, flat incompatibility between the Act of Maryland and the Act of Congress, not simply because of the specific operation of the former, but rather because of the implied claim which it made for state authority. "That the power to tax involves the power to destroy," Marshall continued; "that the power to destroy may defeat and render useless the power to create; that there is a plain

repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures is declared to be supreme over that which exerts the control, are propositions not to be denied." Nor indeed is the sovereignty of the State confined to taxation. "That is not the only mode in which it might be displayed. The question is in truth, a question of supremacy, and if the right of the States to tax the means employed by the General Government be conceded, the declaration that the Constitution and the laws made in pursuance thereof shall be supreme law of the land, is empty and unmeaning declamation. . . . We are unanimously of opinion," concluded the Chief Justice, "that the law . . . of Maryland, imposing a tax on the Bank of the United States is unconstitutional and void."

Five years later, in the case of *Gibbons vs. Ogden*,<sup>1</sup> known to contemporaries as the "Steamboat case," Marshall received the opportunity to apply his principles of constitutional construction to the power of Congress to regulate "commerce among the States." For a quarter of a century Robert R. Livingston and Robert Fulton and

<sup>1</sup> 9 Wheaton, 1.

their successors had enjoyed from the Legislature of New York a grant of the exclusive right to run steamboats on the waters of the State, and in this case one of their licensees, Ogden, was seeking to prevent Gibbons, who had steamers in the coasting trade under an Act of Congress, from operating them on the Hudson in trade between points in New York and New Jersey. A circumstance which made the case the more critical was that New Jersey and Connecticut had each passed retaliatory statutes excluding from their waters any vessel licensed under the Fulton-Livingston monopoly. The condition of interstate commercial warfare which thus threatened was not unlike that which had originally operated so potently to bring about the Constitution.

The case of *Gibbons vs. Ogden* was argued in the early days of February, 1824, with Attorney-General Wirt and Daniel Webster against the grant, while two famous New York lawyers of the day, Thomas Addis Emmet, brother of the Irish patriot, and Thomas J. Oakley, acted as Ogden's counsel. The arguments have the importance necessarily attaching to a careful examination of a novel legal question of the first magnitude by learned and acute minds, but some of the claims that have been

made for these arguments, and especially for Webster's effort, hardly sustain investigation. Webster, never in any case apt to regard his own performance overcritically, seems in later years to have been persuaded that the Chief Justice's opinion "followed closely the track" of his argument on this occasion; and it is true that Marshall expressed sympathy with Webster's contention that Congress may regulate as truly by inaction as by action, since inaction may indicate its wish that the matter go unregulated; but the Chief Justice did not explicitly adopt this idea, and the major part of his opinion was a running refutation of Emmet's argument, which in turn was only an elaboration of Chancellor Kent's opinion upon the same subject in the New York courts.<sup>1</sup> In other words, this was one of those cases in which Marshall's indebtedness to counsel was far less for ideas than for the stimulation which his own powers always received from discussion; and the result is his profoundest, most statesmanlike opinion, from whose doctrines the Court has at times deviated, but only to return to them, until today it is more nearly than ever before the established law on the many points covered by its *dicta*.

<sup>1</sup> See *Livingston vs. Van Ingen*, 9 Johnson, 807 (1812); also Kent's *Commentaries*, I, 432-38.

Marshall pronounced the Fulton-Livingston monopoly inoperative so far as it concerned vessels enrolled under the Act of Congress to engage in the coasting trade; but in arriving at this very simple result his opinion takes the broadest possible range. At the very outset Marshall flatly contradicts Kent's proposition that the powers of the General Government, as representing a grant by sovereignties, must be strictly construed. The Constitution, says he, "contains an enumeration of powers expressly granted by the people to their government," and there is not a word in it which lends any countenance to the idea that these powers should be strictly interpreted. As men whose intentions required no concealment, those who framed and adopted the Constitution "must be understood to have employed words in their natural sense and to have intended what they said"; but if, from the inherent imperfection of language, doubts were at any time to arise "respecting the extent of any given power," then the known purposes of the instrument should control the construction put on its phraseology. "The grant does not convey power which might be beneficial to the grantor if retained by himself . . . but is an investment of power for the general

advantage in the hands of agents selected for the purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents or remain dormant." In no other of his opinions did Marshall so clearly bring out the logical connection between the principle of liberal construction of the Constitution and the doctrine that it is an ordinance of the American people.

Turning then to the Constitution, Marshall asks, "What is commerce?" "Counsel for appellee," he recites, "would limit it to traffic, to buying and selling," to which he answers that "this would restrict a general term . . . to one of its significations. Commerce," he continues, "undoubtedly is traffic, but it is something more — it is intercourse," and so includes navigation. And what is the power of Congress over commerce? "It is the power to regulate, that is, the power to prescribe the rule by which commerce is to be governed." It is a power "complete in itself," exercisable "to its utmost extent," and without limitations "other than are prescribed by the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several

States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States." The power, therefore, is not to be confined by state lines but acts upon its subject-matter wherever it is to be found. "It may, of consequence, pass the jurisdictional line of New York and act upon the very waters to which the prohibition now under consideration applies." It is a power to be exercised within the States and not merely at their frontiers.

But was it sufficient for Marshall merely to define the power of Congress? Must not the power of the State also be considered? At least, Ogden's attorneys had argued, the mere existence in Congress of the power to regulate commerce among the States did not prevent New York from exercising the same power, through legislation operating upon subject matter within its own boundaries. No doubt, he concedes, the States have the right to enact many kinds of laws which will incidentally affect commerce among the States, such for instance as quarantine and health laws, laws regulating bridges and ferries, and so on; but this they do by virtue of their power of "internal police," not by virtue



of a "concurrent" power over commerce, foreign and interstate. And, indeed, New York may have granted Fulton and Livingston their monopoly in exercise of this power, in which case its validity would depend upon its not conflicting with an Act of Congress regulating commerce. For should such conflict exist, the State enactment, though passed "in the exercise of its acknowledged sovereignty," must give place in consequence of the supremacy conferred by the Constitution upon all acts of Congress in pursuance of it, over all state laws whatsoever.

The opinion then proceeds to the consideration of the Act of Congress relied upon by Gibbons. This, Ogden's attorneys contended, merely conferred the American character upon vessels already possessed of the right to engage in the coasting trade; Marshall, on the contrary, held that it conferred the right itself, together with the auxiliary right of navigating the waters of the United States; whence it followed that New York was powerless to exclude Gibbons's vessels from the Hudson. Incidentally Marshall indicated his opinion that Congress's power extended to the carriage of passengers as well as of goods and to vessels propelled by steam as well as to those driven by wind. "The one ele-

ment," said he, "may be as legitimately used as the other for every commercial purpose authorized by the laws of the Union."

Two years later, in the case of *Brown vs. Maryland*,<sup>1</sup> Marshall laid down his famous doctrine that so long as goods introduced into a State in the course of foreign trade remain in the hands of the importer and in the original package, they are not subject to taxation by the State. This doctrine is interesting for two reasons. In the first place, it implies the further principle that an attempt by a State to tax interstate or foreign commerce is tantamount to an attempt to regulate such commerce, and is consequently void. In other words, the principle of the exclusiveness of Congress's power to regulate commerce among the States and with foreign nations, which is advanced by way of *dictum* in *Gibbons vs. Ogden*, becomes in *Brown vs. Maryland* a ground of decision. It is a principle which has proved of the utmost importance in keeping the field of national power clear of encumbering state legislation against the day when Congress should elect to step in and assume effective control. Nor can there be much doubt that the result was intended by the framers of the Constitution.

<sup>1</sup> 12 Wheaton, 419.

In the second place, however, from another point of view this "original package doctrine" is only an extension of the immunity from state taxation established in *M'Culloch vs. Maryland* for instrumentalities of the National Government. It thus reflects the principle implied by that decision: where power exists to any degree or for any purpose, it exists to every degree and for every purpose; or, to quote Marshall's own words in *Brown vs. Maryland*, "questions of power do not depend upon the degree to which it may be exercised; if it may be exercised at all, it may be exercised at the will of those in whose hands it is placed." The attitude of the Court nowadays, when it has to deal with state legislation, is very different. It takes the position that abuse of power, in relation to private rights or to commerce, is excess of power and hence demands to be shown the substantial effect of legislation, not its mere formal justification.<sup>1</sup> In short, its inquiry is into facts. On the other hand, when dealing with congressional legislation, the Court has hitherto always followed Marshall's bolder method. Thus Congress may use its taxing

<sup>1</sup> See Justice Bradley's language in 122 U. S., 326; also the more recent case of *Western Union Telegraph Company vs. Kan.*, 216 U. S., 1.

power to drive out unwholesome businesses, perhaps even to regulate labor within the States, and it may close the channels of interstate and foreign commerce to articles deemed by it injurious to the public health or morals.<sup>1</sup> To date this discrepancy between the methods employed by the Court in passing upon the validity of legislation within the two fields of state and national power has afforded the latter a decided advantage.

The great principles which Marshall developed in his interpretation of the Constitution from the side of national power and which after various ups and downs may be reckoned as part of the law of the land today, were the following:

1. The Constitution is an ordinance of the people of the United States, and not a compact of States.

2. Consequently it is to be interpreted with a view to securing a beneficial use of the powers which it creates, not with the purpose of safeguarding the prerogatives of state sovereignty.

3. The Constitution was further designed, as near as may be, "for immortality," and hence was to be "adapted to the various crises of human affairs," to be kept a commodious vehicle of the national life and not made the Procrustean bed of the nation.

4. While the government which the Constitution

<sup>1</sup> See 195 U. S., 27; 188 U. S., 321; 227 U. S., 308. Cf. 247 U. S., 251.

established is one of enumerated powers, as to those powers it is a sovereign government, both in its choice of the means by which to exercise its powers and in its supremacy over all colliding or antagonistic powers.

5. The power of Congress to regulate commerce is an exclusive power, so that the States may not intrude upon this field even though Congress has not acted.

6. The National Government and its instrumentalities are present within the States, not by the tolerance of the States, but by the supreme authority of the people of the United States.<sup>1</sup>

Of these several principles, the first is obviously the most important and to a great extent the source of the others. It is the principle of which Marshall, in face of the rising tide of State Rights, felt himself to be in a peculiar sense the official custodian. It is the principle which he had in mind in his noble plea at the close of the case of *Gibbons vs. Ogden* for a construction of the Constitution capable of maintaining its vitality and usefulness:

Powerful and ingenious minds [run his words], taking as postulates that the powers expressly granted to the Government of the Union are to be contracted by construction into the narrowest possible compass and that the original powers of the States are to be retained if any possible construction will retain them, may by a course

<sup>1</sup> For the application of Marshall's canons of constitutional interpretation in the field of treaty making, see the writer's *National Supremacy* (N. Y., 1913), Chaps. III and IV.

of refined and metaphysical reasoning . . . explain away the Constitution of our country and leave it a magnificent structure indeed to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles.

## CHAPTER VI

### THE SANCTITY OF CONTRACTS

MARSHALL'S work was one of conservation in so far as it was concerned with interpreting the Constitution in accord with the intention which its framers had of establishing an efficient National Government. But he found a task of restoration awaiting him in that great field of Constitutional Law which defines state powers in relation to private rights.

To provide adequate safeguards for property and contracts against state legislative power was one of the most important objects of the framers, if indeed it was not the most important. Consider, for instance, a colloquy which occurred early in the Convention between Madison and Sherman of Connecticut. The latter had enumerated "the objects of Union" as follows: "First, defense against foreign danger; secondly, against internal disputes and a resort to force; thirdly, treaties with foreign



nations; fourthly, regulating foreign commerce and drawing revenue from it." To this statement Madison demurred. The objects mentioned were important, he admitted, but he "combined with them the necessity of providing more effectually for the securing of private rights and the steady dispensation of justice. Interferences with these were evils which had, more perhaps than anything else, produced this Convention."

Marshall's sympathy with this point of view we have already noted.<sup>1</sup> Nor was Madison's reference solely to the then recent activity of state Legislatures in behalf of the much embarrassed but politically dominant small farmer class. He had also in mind that other and more ancient practice of Legislatures of enacting so-called "special legislation," that is, legislation altering under the standing law the rights of designated parties, and not infrequently to their serious detriment. Usually such legislation took the form of an intervention by the Legislature in private controversies pending in, or already decided by, the ordinary courts, with the result that judgments were set aside, executions canceled, new hearings granted, new rules of evidence introduced, void wills validated, valid contracts

<sup>1</sup> See *supra*, p. 34 ff.

voided, forfeitures pronounced — all by legislative mandate. Since that day the courts have developed an interpretation of the principle of the separation of powers and have enunciated a theory of “due process of law,” which renders this sort of legislative abuse quite impossible; but in 1787, though the principle of the separation of powers had received verbal recognition in several of the state Constitutions, no one as yet knew precisely what the term “legislative power” signified, and at that time judicial review did not exist.<sup>1</sup> Hence those who wished to see this nuisance of special legislation abated felt not unnaturally that the relief must come from some source external to the local governments, and they welcomed the movement for a new national Constitution as affording them their opportunity.

The Constitution, in Article I, Section x, forbids the States to “emit bills of credit, make anything but gold and silver a legal tender in payment of debts, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.” Until 1798, the provision generally regarded as offering the most promising weapon against special

<sup>1</sup> On special legislation, see the writer's *Doctrine of Judicial Review* (Princeton, 1914), pp. 36-37, 69-71.

legislation was the *ex post facto* clause. In that year, however, in its decision in *Calder vs. Bull* the Court held that this clause "was not inserted to secure the citizen in his private rights of either property or contracts," but only against certain kinds of penal legislation. The decision roused sharp criticism and the judges themselves seemed fairly to repent of it even in handing it down. Justice Chase, indeed, even went so far as to suggest, as a sort of stop-gap to the breach they were thus creating in the Constitution, the idea that, even in the absence of written constitutional restrictions, the Social Compact as well as "the principles of our free republican governments" afforded judicially enforceable limitations upon legislative power in favor of private rights. Then, in the years immediately following, several state courts, building upon this dictum, had definitely announced their intention of treating as void all legislation which they found unduly to disturb vested rights, especially if it was confined in its operation to specified parties.<sup>1</sup>

Such was still the situation when the case of

<sup>1</sup> In connection with this paragraph, see the writer's article entitled *The Basic Doctrine of American Constitutional Law*, in the *Michigan Law Review*, February, 1914. Marshall once wrote Story regarding

Fletcher *vs.* Peck<sup>1</sup> in 1810 raised before the Supreme Court the question whether the Georgia Legislature had the right to rescind a land grant made by a preceding Legislature. On any of three grounds Marshall might easily have disposed of this case before coming to the principal question. In the first place, it was palpably a moot case; that is to say, it was to the interest of the opposing parties to have the rescinding act set aside. The Court would not today take jurisdiction of such a case, but Marshall does not even suggest such a solution of the question, though Justice Johnson does in his concurring opinion. In the second place, Georgia's own claim to the lands had been most questionable, and consequently her right to grant them to others was equally dubious; but this, too, is an issue which Marshall avoids. Finally, the grant had been procured by corrupt means, but Marshall ruled that this was not a subject the

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his attitude toward Section x in 1787, as follows: "The questions which were perpetually recurring in the State legislatures and which brought annually into doubt principles which I thought most sacred, which proved that everything was afloat, and that we had no safe anchorage ground, gave a high value in my estimation to that article of the Constitution which imposes restrictions on the States."

*Discourse.*

<sup>1</sup> 6 Cranch, 87.

Court might enter upon; and for the ordinary run of cases in which undue influence is alleged to have induced the enactment of a law, the ruling is clearly sound. But this was no ordinary case. The fraud asserted against the grant was a matter of universal notoriety; it was, indeed, the most resounding scandal of the generation; and surely judges may assume to know what is known to all and may act upon their knowledge.

Furthermore, when one turns to the part of Marshall's opinion which deals with the constitutional issue, one finds not a little evidence of personal predilection on the part of the Chief Justice. He starts out by declaring the rescinding act void as a violation of vested rights, of the underlying principles of society and government, and of the doctrine of the separation of powers. Then he apparently realizes that a decision based on such grounds must be far less secure and much less generally available than one based on the words of the Constitution; whereupon he brings forward the obligation of contracts clause. At once, however, he is confronted with the difficulty that the obligation of a contract is the obligation of a contract still to be fulfilled, and that a grant is an executed contract over and done with — *functus officio*. This

difficulty he meets by asserting that every grant is attended by an implied contract on the part of the grantor not to reassert his right to the thing granted. This, of course, is a palpable fiction on Marshall's part, though certainly not an unreasonable one. For undoubtedly when a grant is made without stipulation to the contrary, both parties assume that it will be permanent.

The greater difficulty arose from the fact that, whether implied or explicit, the contract before the Court was a *public* one. In the case of private contracts it is easy enough to distinguish the contract, as the agreement between the parties, from the obligation of the contract which comes from the law and holds the parties to their engagements. But what law was there to hold Georgia to her supposed agreement not to rescind the grant she had made? Not the Constitution of the United States unattended by any other law, since it protects the obligation only after it has come into existence. Not the Constitution of Georgia as construed by her own courts, since they had sustained the rescinding act. Only one possibility remained; the State Constitution must be the source of the obligation — yes; but the State Constitution as it was construed by the United States Supreme

Court in this very case, in the light of the "general principles of our political institutions." In short the obligation is a moral one; and this moral obligation is treated by Marshall as having been converted into a legal one by the United States Constitution.

However, Marshall apparently fails to find entire satisfaction in this argument, for he next turns to the prohibition against bills of attainder and *ex post facto* laws with a question which manifests disapproval of the decision in *Calder vs. Bull*. Yet he hesitates to overrule *Calder vs. Bull*, and, indeed, even at the very end of his opinion he still declines to indicate clearly the basis of his decision. The State of Georgia, he says, "was restrained" from the passing of the rescinding act "either by general principles which are common to our free institutions, or by particular provisions of the Constitution of the United States." It was not until nine years after *Fletcher vs. Peck* that this ambiguity was cleared up in the *Dartmouth College* case in 1819.

The case of the Trustees of Dartmouth College *vs. Woodward*<sup>1</sup> was a New England product and

<sup>1</sup> The following account of this case is based on J. M. Shirley's *Dartmouth College Causes* (St. Louis, 1879) and on the official report, *Wheaton*, 518.



redolent of the soil from which it sprang. In 1754 the Reverend Eleazar Wheelock of Connecticut had established at his own expense a charity school for instructing Indians in the Christian religion; and so great was his success that he felt encouraged to extend the undertaking and to solicit donations in England. Again success rewarded his efforts; and in 1769 Governor Wentworth of New Hampshire, George III's representative granted the new institution, which was now located at Hanover, New Hampshire, a charter incorporating twelve named persons as "The Trustees of Dartmouth College" with the power to govern the institution, appoint its officers, and fill all vacancies in their own body "forever."

For many years after the Revolution, the Trustees of Dartmouth College, several of whom were ministers, reflected the spirit of Congregationalism. Though this form of worship occupied almost the position of a state religion in New Hampshire, early in this period difficulties arose in the midst of the church at Hanover. A certain Samuel Hayes, or Haze, told a woman named Rachel Murch that her character was "as black as Hell," and upon Rachel's complaint to the session, he was "churched" for "breach of the Ninth Commandment and

also for a violation of his covenant agreement.” This incident caused a rift which gradually developed into something very like a schism in the local congregation, and this internal disagreement finally produced a split between Eleazar’s son, Dr. John Wheelock, who was now president of Dartmouth College, and the Trustees of the institution. The result was that in August, 1815, the Trustees ousted Wheelock.

The quarrel had thus far involved only Calvinists and Federalists, but in 1816 a new element was brought in by the interference of the Governor of New Hampshire, William Plumer, formerly a Federalist but now, since 1812, the leader of the Jeffersonian party in the State. In a message to the Legislature dated June 6, 1816, Plumer drew the attention of that body to Dartmouth College. “All literary establishments,” said he, “like everything human, if not duly attended to, are subject to decay. . . . As it [the charter of the College] emanated from royalty, it contained, as was natural it should, principles congenial to monarchy,” and he cited particularly the power of the Board of Trustees to perpetuate itself. “This last principle,” he continued, “is hostile to the spirit and genius of a free government. Sound policy

therefore requires that the mode of election should be changed and that Trustees in future should be elected by some other body of men. . . . The College was formed for the *public* good, not for the benefit or emolument of its Trustees; and the right to amend and improve acts of incorporation of this nature has been exercised by all governments, both monarchical and republican."

Plumer sent a copy of his message to Jefferson and received a characteristic answer in reply: "It is replete," said the Republican sage, "with sound principles. . . . The idea that institutions established for the use of the nation cannot be touched nor modified, even to make them answer their end . . . is most absurd. . . . Yet our lawyers and priests generally inculcate this doctrine, and suppose that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves; . . . in fine, that the earth belongs to the dead and not to the living." And so, too, apparently the majority of the Legislature believed; for by the measure which it promptly passed, in response to Plumer's message, the College was made Dartmouth University, the number of its trustees was increased to twenty-one, the appointment of the

additional members being given to the Governor, and a board of overseers, also largely of gubernatorial appointment, was created to supervise all important acts of the trustees.

The friends of the College at once denounced the measure as void under both the State and the United States Constitution and soon made up a test case. In order to obtain the college seal, charter, and records, a mandate was issued early in 1817 by a local court to attach goods, to the value of \$50,000, belonging to William H. Woodward, the Secretary and Treasurer of the "University." This was served by attaching a chair "valued at one dollar." The story is also related that authorities of the College, apprehending an argument that the institution had already forfeited its charter on account of having ceased to minister to Indians, sent across into Canada for some of the aborigines, and that three were brought down the river to receive matriculation, but becoming panic-stricken as they neared the town, leaped into the water, swam ashore, and disappeared in the forest. Unfortunately this interesting tale has been seriously questioned.

The attorneys of the College before the Superior Court were Jeremiah Mason, one of the best lawyers of the day, Jeremiah Smith, a former Chief

Justice of New Hampshire, and Daniel Webster. These three able lawyers argued that the amending act exceeded "the rightful ends of legislative power," violated the principle of the separation of powers, and deprived the trustees of their "privileges and immunities" contrary to the "law of the land" clause of the State Constitution, and impaired the obligation of contracts. The last contention stirred Woodward's attorneys, Bartlett and Sullivan, to ridicule. "By the same reasoning," said the latter, "every law must be considered in the nature of a contract, until the Legislature would find themselves in such a labyrinth of contracts, with the United States Constitution over their heads, that not a subject would be left within their jurisdiction"; the argument was an expedient of desperation, he said, a "last straw." The principal contention advanced in behalf of the Act was that the College was "a public corporation," whose "various powers, capacities, and franchises all . . . were to be exercised for the benefit of the public," and were therefore subject to public control. And the Court, in sustaining the Act, rested its decision on the same ground. Chief Justice Richardson conceded the doctrine of *Fletcher vs. Peck*, that the obligation of contracts

clause "embraced all contracts relating to private property, whether executed or executory, and whether between individuals, between States, or between States and individuals," but, he urged, "a distinction is to be taken between particular grants by the Legislature of property or privileges to individuals for their own benefit, and grants of power and authority to be exercised for public purposes." Its public character, in short, left the College and its holdings at the disposal of the Legislature.

Of the later proceedings, involving the appeal to Washington and the argument before Marshall, early in March, 1818, tradition has made Webster the central and compelling figure, and to the words which it assigns him in closing his address before the Court has largely been attributed the great legal triumph which presently followed. The story is, at least, so well found that the chronicler of *Dartmouth College vs. Woodward* who should venture to omit it must be a bold man indeed.

The argument ended [runs the tale], Mr. Webster stood for some moments silent before the Court, while every eye was fixed intently upon him. At length, addressing the Chief Justice, he proceeded thus: "This, sir, is my

case. It is the case . . . of every college in our land. . . . Sir, you may destroy this little institution. . . . You may put it out. But if you do so, you must carry through your work! You must extinguish, one after another, all those greater lights of science, which, for more than a century have thrown their radiance over our land. It is, Sir, as I have said, a small college. And yet there are those who love it — ”

Here, the feelings which he had thus far succeeded in keeping down, broke forth, his lips quivered; his firm cheeks trembled with emotion, his eyes filled with tears. . . . The court-room during these two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall and gaunt figure bent over, as if to catch the slightest whisper, the deep furrows of his cheek expanded with emotion, and his eyes suffused with tears; Mr. Justice Washington at his side, with small and emaciated frame, and countenance more like marble than I ever saw on any other human being. . . . There was not one among the strong-minded men of that assembly who could think it unmanly to weep, when he saw standing before him the man who had made such an argument, melted into the tenderness of a child.

Mr. Webster had now recovered his composure, and, fixing his keen eyes on Chief Justice Marshall, said in that deep tone with which he sometimes thrilled the heart of an audience: “Sir, I know not how others may feel . . . but for myself, when I see my Alma Mater surrounded, like Cæsar in the Senate house, by those who are reiterating stab after stab, I would not, for my right hand, have her turn to me and say, *Et tu quoque mi fili!* And thou, too, my son!”



Whether this extraordinary scene, first described thirty-four years afterward by a putative witness of it, ever really occurred or not, it is today impossible to say.<sup>1</sup> But at least it would be an error to attribute to it great importance. From the same source we have it that at Exeter, too, Webster had made the judges weep — yet they had gone out and decided against him. Judges do not always decide the way they weep!

Of the strictly legal part of his argument Webster himself has left us a synopsis. Fully three-quarters of it dealt with the questions which had been discussed by Mason before the State Supreme Court under the New Hampshire Constitution and was largely irrelevant to the great point at issue at Washington. Joseph Hopkinson, who was now associated with Webster, contributed far more to the content of Marshall's opinion; yet he, too, left one important question entirely to the Chief Justice's ingenuity, as will be indicated shortly. Fortunately for the College its opponents were ill prepared to take advantage of the vulnerable points of its defense. For some unknown reason,

<sup>1</sup> Professor Goodrich of Yale, who is responsible for the story, communicated it to Rufus Choate in 1853. It next appears on Goodrich's authority in Curtis's *Webster*, vol. II, pp. 169-71.

Bartlett and Sullivan, who had carried the day at Exeter, had now given place to William Wirt and John Holmes. Of these the former had just been made Attorney-General of the United States and had no time to give to the case — indeed he admitted that “he had hardly thought of it till it was called on.” As for Holmes, he was a “kaleidoscopic politician” and barroom wit, best known to contemporaries as “the noisy eulogist and reputed protégé of Jefferson.” A remarkable strategy that, which stood such a person up before John Marshall to plead the right of state Legislatures to dictate the fortunes of liberal institutions!

The arguments were concluded on Thursday, the 12th of March. The next morning the Chief Justice announced that the Court had conferred, that there were different opinions, that some of the judges had not arrived at a conclusion, and that consequently the cause must be continued. Webster, however, who was apt to be much in “the know” of such matters, ventured to place the different judges thus: “The Chief and Washington,” he wrote his former colleague Smith, “I have no doubt, are with us. Duvall and Todd perhaps against us; the other three holding up — I cannot much doubt but that Story will be with us in the

end, and I think we have much more than an even chance for one of the others."

The friends of the College set promptly to work to bring over the wavering judges. To their dismay they learned that Chancellor James Kent of New York, whose views were known to have great weight with Justices Johnson and Livingston, had expressed himself as convinced by Chief Justice Richardson's opinion that Dartmouth College was a public corporation. Fortunately, however, a little ransacking of the records brought to light an opinion which Kent and Livingston had both signed as early as 1803, when they were members of the New York Council of Revision, and which took the ground that a then pending measure in the New York Legislature for altering the Charter of New York City violated "due process of law." At the same time, Charles Marsh, a friend of both Kent and Webster, brought to the attention of the former Webster's argument before Marshall at Washington in March, 1818. Then came a series of conferences at Albany in which Chancellor Kent, Justice Johnson, President Brown of Dartmouth College, Governor Clinton, and others participated. As a result, the Chancellor owned himself converted to the idea that the College was a private institution.

The new term of court opened on Monday, February 1, 1819. William Pinkney, who in vacation had accepted a retainer from the backers of Woodward, that is, of the State, took his stand on the second day near the Chief Justice, expecting to move for a reargument. Marshall, "turning his blind eye" to the distinguished Marylander, announced that the Court had reached a decision, plucked from his sleeve an eighteen folio manuscript opinion, and began reading it. He held that the College was a "private eleemosynary institution"; that its charter was the outgrowth of a contract between the original donors and the Crown, that the trustees represented the interest of the donors, and that the terms of the Constitution were broad enough to cover and protect this representative interest. The last was the only point on which he confessed a real difficulty. The primary purpose of the constitutional clause, he owned, was to protect "contracts the parties to which have a vested beneficial interest" in them, whereas the trustees had no such interest at stake. But, said he, the case is within the words of the rule, and "must be within its operation likewise, unless there be something in the literal construction" obviously at war with the spirit of the

Constitution, which was far from the fact. For, he continued, "it requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our Constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts" generally, they yet deemed it desirable to leave this sort of contract subject to legislative interference. Such is Marshall's answer to Jefferson's outburst against "the dead hand."

Characteristically, Marshall nowhere cites *Fletcher vs. Peck* in his opinion, but he builds on the construction there made of the "obligation of contracts" clause as clearly as do his associates, Story and Washington, who cite it again and again in their concurring opinion. Thus he concedes that the British Parliament, in consequence of its unlimited power, might at any time before the Revo-

lution have annulled the charter of the College and so have disappointed the hopes of the donors; but, he adds, "*the perfidy of the transaction would have been universally acknowledged.*" Later on, he further admits that at the time of the Revolution the people of New Hampshire succeeded to "the transcendent power of Parliament," as well as to that of the King, with the result that a repeal of the charter before 1789 could have been contested only under the State Constitution. "But the Constitution of the United States," he continues, "has imposed this additional limitation, that the Legislature of a State shall pass no act 'impairing the obligation of contracts.'" In short, as in *Fletcher vs. Peck*, what was originally a moral obligation is regarded as having been lifted by the Constitution into the full status of a legal one, and this time without any assistance from "the general principles of our free institutions."

How is the decision of the Supreme Court in the case of *Dartmouth College vs. Woodward* to be assessed today? Logically the basis of it was repudiated by the Court itself within a decade, albeit the rule it lays down remained unaffected. Historically it is equally without basis, for the intention of the obligation of contracts clause, as the

evidence amply shows, was to protect private executory contracts, and especially contracts of debt.<sup>1</sup> In actual practice, on the other hand, the decision produced one considerable benefit: in the words of a contemporary critic, it put private institutions of learning and charity out of the reach of "legislative despotism and party violence."

But doubtless, the critic will urge, by the same sign this decision also put profit-seeking corporations beyond wholesome legislative control. But is this a fact? To begin with, such a criticism is clearly misdirected. As we have just seen, the New Hampshire Superior Court itself would have felt that *Fletcher vs. Peck* left it no option but to declare the amending act void, had Dartmouth College been, say, a gas company; and this was in all probability the universal view of bench and bar in 1819. Whatever blame there is should therefore be awarded the earlier decision. But, in the second place, there does not appear after all to be so great measure of blame to be awarded. The opinion in *Dartmouth College vs. Woodward* leaves it perfectly clear that legislatures may reserve the right to alter or repeal at will the charters they grant.

<sup>1</sup> Much of the evidence is readily traceable through the Index to Max Farrand's *Records of the Federal Convention*.



If therefore alterations and repeals have not been as frequent as public policy has demanded, whose fault is it?

Perhaps, however, it will be argued that the real mischief of the decision has consisted in its effect upon the state Legislatures themselves, the idea being that large business interests, when offered the opportunity of obtaining irrepealable charters, have frequently found it worth their while to assail frail legislative virtue with irresistible temptation. The answer to this charge is a "confession in avoidance"; the facts alleged are true enough but hardly to the point. Yet even if they were, what is to be said of that other not uncommon incident of legislative history, the legislative "strike," whereby corporations not protected by irrepealable charters are blandly confronted with the alternative of having their franchises mutilated or of paying handsomely for their immunity? So the issue seems to resolve itself into a question of taste regarding two species of legislative "honesty." Does one prefer that species which, in the words of the late Speaker Reed, manifests itself in "staying bought," or that species which flowers in legislative blackmail? The truth of the matter is that Marshall's decision has been condemned by ill-informed or

ill-intentioned critics for evils which are much more simply and much more adequately explained by general human cupidity and by the power inherent in capital. These are evils which have been experienced quite as fully in other countries which never heard of the "obligation of contracts" clause.

The decisions reached in *Fletcher vs. Peck* and *Dartmouth College vs. Woodward* are important episodes in a significant phase of American constitutional history. Partly on account of the lack of distinction between legislative and judicial power and partly on account of the influence of the notion of parliamentary sovereignty, legislative bodies at the close of the eighteenth century were the sources of much anonymous and corporate despotism. Even in England as well as in this country the value, and indeed the possibility, of representative institutions had been frankly challenged in the name of liberty. For the United States the problem of making legislative power livable and tolerable — a problem made the more acute by the multiplicity of legislative bodies — was partly solved by the establishment of judicial review. But this was only the first step: legislative power had still to be defined and confined. Marshall's audacity in invoking generally recognized moral principles

against legislative sovereignty in his interpretation of the "obligation of contracts" clause pointed the way to the American judiciaries for the discharge of their task of defining legislative power. The final result is to be seen today in the Supreme Court's concept of the police power of a State as a power not of arbitrary but of reasonable legislation.

While Marshall was performing this service in behalf of representative government, he was also aiding the cause of nationalism by accustoming certain types of property to look upon the National Government as their natural champion against the power of the States. In this connection it should also be recalled that *Gibbons vs. Ogden* and *Brown vs. Maryland* had advanced the principle of the exclusiveness of Congress's power over foreign and interstate commerce. Under the shelter of this interpretation there developed, in the railroad and transportation business of the country before the Civil War, a property interest almost as extensive as that which supported the doctrine of State Rights. Nor can it be well doubted that Marshall designed some such result or that he aimed to prompt the reflection voiced by King of Massachusetts on the floor of the Federal Convention. "He was filled with astonishment that, if we

were convinced that every *man* in America was secured in all his rights, we should be ready to sacrifice this substantial good to the phantom of *state* sovereignty."

Lastly, these decisions brought a certain theoretical support to the Union. Marshall himself did not regard the Constitution as a compact between the States; if a compact at all, it was a compact among individuals, a social compact. But a great and increasing number of his countrymen took the other view. How unsafe, then, it would have been from the standpoint of one concerned for the integrity of the Union, to distinguish public contracts from private on the ground that the former, in the view of the Constitution, had less obligation!

## CHAPTER VII

### THE MENACE OF STATE RIGHTS

MARSHALL'S reading of the Constitution may be summarized in a phrase: it transfixed State Sovereignty with a two-edged sword, one edge of which was inscribed "National Supremacy," and the other "Private Rights." Yet State Sovereignty, ever reanimated by the democratic impulse of the times, remained a serpent which was scotched but not killed. To be sure, this dangerous enemy to national unity had failed to secure for the state Legislatures the right to interpret the Constitution with authoritative finality; but its argumentative resources were still far from exhausted, and its political resources were steadily increasing. It was still capable of making a notable resistance even in withdrawing itself, until it paused in its recoil and flung itself forward in a new attack.

The connecting link between the Supreme Court and the state courts has already been pointed out

to be Section xxv of the Act of 1789 organizing the Federal Judiciary.<sup>1</sup> This section provides, in effect, that when a suit is brought in a state court under a state law, and the party against whom it is brought claims some right under a national law or treaty or under the Constitution itself, the highest state court into which the case can come must either sustain such a claim or consent to have its decision reviewed, and possibly reversed, by the Supreme Court. The defenders of State Rights at first applauded this arrangement because it left to the local courts the privilege of sharing a jurisdiction which could have been claimed exclusively by the Federal Courts. But when State Rights began to grow into State Sovereignty, a different attitude developed, and in 1814 the Virginia Court of Appeals, in the case of *Hunter vs. Martin*,<sup>2</sup> pronounced Section xxv void, though, in order not to encourage the disloyal tendencies then rampant in New England, the decision was not published until after the Treaty of Ghent, in February, 1815.

The head and front of the Virginia court at this time was Spencer Roane, described as "the most

<sup>1</sup> See pages 14-15.

<sup>2</sup> 4 Munford (Va.), 1. See also William E. Dodd's article on *Chief Justice Marshall and Virginia* in *American Historical Review*, vol. XII, p. 776.

powerful politician in the State," an ardent Jeffersonian, and an enemy of Marshall on his own account, for had Ellsworth not resigned so inopportunately, late in 1800, and had Jefferson had the appointment of his successor, Roane would have been the man. His opinion in *Hunter vs. Martin* disclosed personal animus in every line and was written with a vehemence which was more likely to discomfit a grammarian than its designed victims; but it was withal a highly ingenious plea. At one point Roane enjoyed an advantage which would not be his today when so much more gets into print, for the testimony of Madison's *Journal*, which was not published till 1840, is flatly against him on the main issue. In 1814, however, the most nearly contemporaneous evidence as to the intention of the framers of the Constitution was that of the *Federalist*, which Roane stigmatizes as "a mere newspaper publication written in the heat and fury of the battle," largely by "a supposed favorer of a consolidated government." This description not only overlooks the obvious effort of the authors of the *Federalist* to allay the apprehensions of state jealousy but it also conveniently ignores Madison's part in its composition. Indeed, the *enfant terrible* of State Rights, the Madison of 1787-88, Roane



would fain conceal behind the Madison of ten years later; and the Virginia Resolutions of 1798 and the Report of 1799 he regards the earliest "just exposition of the principles of the Constitution."

To the question whether the Constitution gave "any power to the Supreme Court of the United States to reverse the judgment of the supreme court of a State," Roane returned an emphatic negative. His argument may be summarized thus: The language of Article III of the Constitution does not regard the state courts as composing a part of the judicial organization of the General Government; and the States, being sovereign, cannot be stripped of their power merely by implication. Conversely, the General Government is a government over individuals and is therefore expected to exercise its powers solely through its own organs. To be sure, the judicial power of the United States extends to "all cases arising" under the Constitution and the laws of the United States. But in order to come within this description, a case must not merely involve the construction of the Constitution or laws of the United States; it must have been instituted in the United States courts, and not in those of another Government. Further, the Constitution and the acts of Congress "in

pursuance thereof" are "the supreme law of the land," and "the judges in every State" are "bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." But they are bound as state judges and only as such; and what the Constitution is, or what acts of Congress are "in pursuance" of it, is for them to declare without any correction or interference by the courts of another jurisdiction. Indeed, it is through the power of its courts to say finally what acts of Congress are constitutional and what are not, that the State is able to exercise its right of arresting within its boundaries unconstitutional measures of the General Government. For the legislative nullification of such measures proposed by the Virginia and Kentucky resolutions is thus substituted judicial nullification by the local judiciaries.

In *Martin vs. Hunter's Lessee*,<sup>1</sup> which was decided in February, 1816, Story, speaking for the Court, undertook to answer Roane. Roane's major premise he met with flat denial: "It is a mistake," he asserts, "that the Constitution was not designed to operate upon States in their corporate capacities. It is crowded with provisions

<sup>1</sup> 1 Wheaton, 304. Marshall had an indirect interest in the case. See *supra*, pp. 44-45.

which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives." The greater part of the opinion, however, consisted of a minute examination of the language of Article III of the Constitution. In brief, he pointed out that while Congress "may . . . establish" inferior courts and, therefore, may not, it was made imperative that the judicial power of the United States "shall extend to all cases arising . . . under" the Constitution and acts of Congress. If, therefore, Congress should exercise its option and not establish inferior courts, in what manner, he asked, could the purpose of the Constitution be realized except by providing appeals from the state courts to the United States Supreme Court? But more than that, the practical consequences of the position taken by the Virginia Court of Appeals effectually refuted it. That there should be as many versions of the Constitution, laws, and treaties as there are States in the Union was certainly never intended by the framers, nor yet that plaintiffs alone should say when resort should be had to the national tribunals, which were designed for the benefit of all.

If Story's argument is defective at any point, it is in its failure to lay down a clear definition of

"cases arising under this Constitution," and this defect in constitutional interpretation is supplied five years later in Marshall's opinion in *Cohens vs. Virginia*.<sup>1</sup> The facts of this famous case were as follows: Congress had established a lottery for the District of Columbia, for which the Cohens had sold tickets in Virginia. They had thus run foul of a state law prohibiting such transactions and had been convicted of the offense in the Court of Quarterly Sessions of Norfolk County and fined one hundred dollars. From this judgment they were now appealing under Section xxv.

Counsel for the State of Virginia again advanced the principles which had been developed by Roane in *Hunter vs. Martin* but urged in addition that this particular appeal rendered Virginia a defendant contrary to Article XI of the Amendments. Marshall's summary of their argument at the outset of his opinion is characteristic: "They maintain," he said, "that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made by a part against the legitimate powers of the whole, and that the government is reduced to the alternative of submitting to such attempts or of

<sup>1</sup> 6 Wheaton, 264.

resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself or of the laws or treaties of the nation, but that this power must be exercised in the last resort by the courts of every State in the Union. That the Constitution, laws, and treaties may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable."

The cause of such absurdities, Marshall continued, was a conception of State Sovereignty contradicted by the very words of the Constitution, which assert its supremacy, and that of all acts of Congress in pursuance of it, over all conflicting state laws whatsoever. "This," he proceeded to say, "is the authoritative language of the American People, and if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the Government of the Union and those of the States. The General Government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution, and if there be any who deny its necessity, none can deny its authority." Nor was this to say that the Constitution is unalterable. "The

people make the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or unmake resides only in the whole body of the people, not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."

Once Marshall had swept aside the irrelevant notion of State Sovereignty, he proceeded with the remainder of his argument without difficulty. Counsel for Virginia had contended that "a case arising under the Constitution or a law must be one in which a party comes into court to demand something conferred on him by the Constitution or a law"; but this construction Marshall held to be "too narrow." "A case in law or equity consists of the right of the one party as well as of the other, and may truly be said to arise under the Constitution or a law of the United States *whenever its correct decision depends on the construction of either.*" From this it followed that Section XXV was a measure necessary and proper for extending the judicial power of the United States appellately to such cases whenever they were first

brought in a state court. Nor did Article XI of the Amendments nullify the power thus conferred upon the Court in a case which the State itself had instituted, for in such a case the appeal taken to the national tribunal was only another stage in an action "begun and prosecuted," not against the State, but by the State. The contention of Virginia was based upon the assumption that the Federal and the State Judiciaries constituted independent systems for the enforcement of the Constitution, the national laws, and treaties, and such an assumption Marshall held to be erroneous. For the purposes of the Constitution the United States "form a single nation," and in effecting these purposes the Government of the Union may "legitimately control all individuals or governments within the American territory."

"Our opinion in the Bank Case," Marshall had written Story from Richmond in 1819, a few weeks after *M'Culloch vs. Maryland*, "has roused the sleeping spirit of Virginia, if indeed it ever sleeps." *Cohens vs. Virginia*, in 1821, produced an even more decided reaction. Jefferson, now in retirement, had long since nursed his antipathy for the Federal Judiciary to the point of monomania. It was in his eyes "a subtle corps of sappers and



miners constantly working underground to undermine our confederated fabric"; and this latest assault upon the rights of the States seemed to him, though perpetrated in the usual way, the most outrageous of all: "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind by the turn of his own reasoning."

Roane, Jefferson's protégé, was still more violent and wrote a series of unrestrained papers at this time in the *Richmond Enquirer*, under the pseudonym "Algernon Sidney." Alluding to these, Marshall wrote Story that "their coarseness and malignity would designate the author of them if he was not avowed." Marshall himself thought to answer Roane, but quickly learned that the Virginia press was closed to that side of the question. He got his revenge, however, by obtaining the exclusion of Roane's effusions from Hall's *Law Journal*, an influential legal periodical published in Philadelphia. But the personal aspect of the controversy was the least important. "A deep design," Marshall again wrote his colleague, "to convert our Government into a mere league of States has

taken hold of a powerful and violent party in Virginia. The attack upon the judiciary is in fact an attack upon the Union." Nor was Virginia the only State where this movement was formidable, and an early effort to repeal Section xxv was to be anticipated.

That the antijudicial movement was extending to other States was indeed apparent. The decision in *Sturges vs. Crowninshield*<sup>1</sup> left for several years the impression that the States could not pass bankruptcy laws even for future contracts and consequently afforded a widespread grievance. Ohio had defied the ruling in *M'Culloch vs. Maryland*, and her Treasurer was languishing in jail by the mandate of the Federal Circuit Court. Kentucky had a still sharper grievance in the decision in *Green vs. Biddle*,<sup>2</sup> which invalidated a policy she had been pursuing for nearly a quarter of a century with reference to squatters' holdings; and what made the decision seem the more outrageous was the mistaken belief that it had represented the views of only a minority of the justices.

The Legislatures of the aggrieved States were soon in full hue and cry at the heels of the Court; and from them the agitation quickly spread to

<sup>1</sup> 4 Wheaton, 122.

<sup>2</sup> 8 Wheaton, 1.

Congress.<sup>1</sup> On December 12, 1821, Senator Johnson of Kentucky proposed an amendment to the Constitution which was intended to substitute the Senate for the Supreme Court in all constitutional cases. In his elaborate speech in support of his proposition, Johnson criticized at length the various decisions of the Court but especially those grounded on its interpretation of the "obligation of contracts" clause. More than that, however, he denied *in toto* the rights of the Federal Courts to pass upon the constitutionality either of acts of Congress or of state legislative measures. So long as judges were confined to the field of jurisprudence, the principles of which were established and immutable, judicial independence was all very well, said Johnson, but "the science of politics was still in its infancy"; and in a republican system of government its development should be entrusted to those organs which were responsible to the people. Judges were of no better clay than other folk. "Why, then, " he asked, "should they be considered any more infallible, or their decisions any less subject to investigation and revision?"

<sup>1</sup> For a good review of the contemporary agitation aroused by Marshall's decisions, see two articles by Charles Warren in the *American Law Review*, vol. XLVII, pp. 1 and 161.

Furthermore, "courts, like cities, and villages, or like legislative bodies, will sometimes have their leaders; and it may happen that a single individual will be the prime cause of a decision to overturn the deliberate act of a whole State or of the United States; yet we are admonished to receive their opinions as the ancients did the responses of the Delphic oracle, or the Jews, with more propriety, the communications from Heaven delivered by *Urim* and *Thummim* to the High Priest of God's chosen people."

For several years after this, hardly a session of Congress convened in which there was not introduced some measure for the purpose either of curbing the Supreme Court or of curtailing Marshall's influence on its decisions. One measure, for example, proposed the repeal of Section xxv; another, the enlargement of the Court from seven to ten judges; another, the requirement that any decision setting aside a state law must have the concurrence of five out of seven judges; another, the allowance of appeals to the Court on decisions adverse to the constitutionality of state laws as well as on decisions sustaining them. Finally, in January, 1826, a bill enlarging the Court to ten judges passed the House by a vote of 132 to 27.

In the Senate, Rowan of Kentucky moved an amendment requiring in all cases the concurrence of seven of the proposed ten judges. In a speech which was typical of current criticism of the Court he bitterly assailed the judges for the protection they had given the Bank — that “political juggernaut,” that “creature of the perverted corporate powers of the Federal Government” — and he described the Court itself as “placed above the control of the will of the people, in a state of disconnection with them, inaccessible to the charities and sympathies of human life.” The amendment failed, however, and in the end the bill itself was rejected.

Yet a proposition to swamp the Court which received the approval of four-fifths of the House of Representatives cannot be lightly dismissed as an aberration. Was it due to a fortuitous coalescence of local grievances, or was there a general underlying cause? That Marshall’s principles of constitutional law did not entirely accord with the political and economic life of the nation at this period must be admitted. The Chief Justice was at once behind his times and ahead of them. On the one hand, he was behind his times because he failed to appreciate adequately the fact that

freedom was necessary to frontier communities in meeting their peculiar problems — a freedom which the doctrine of State Rights promised them — and so he had roused Kentucky's wrath by the pedantic and, as the Court itself was presently forced to admit, unworkable decision in *Green vs. Biddle*. Then on the other hand, the nationalism of this period was of that negative kind which was better content to worship the Constitution than to make a really serviceable application of the national powers. After the War of 1812 the great and growing task which confronted the rapidly expanding nation was that of providing adequate transportation, and had the old federalism from which Marshall derived his doctrines been at the helm, this task would undoubtedly have been taken over by the National Government. By Madison's veto of the Cumberland Road Bill, however, in 1816, this enterprise was handed over to the States; and they eagerly seized upon it after the opening of the Erie Canal in 1825 and the perception of the immense success of the venture. Later, to be sure, the panic of 1837 transferred the work of railroad and canal building to the hands of private capital but, after all, without altering greatly the constitutional problem. For with corporations

to be chartered, endowed with the power of eminent domain, and adequately regulated, local policy obviously called for widest latitude.

Reformers are likely to count it a grievance that the courts do not trip over themselves in an endeavor to keep abreast with what is called "progress." But the true function of courts is not to reform, but to maintain a definite *status quo*. The Constitution defined a *status quo* the fundamental principles of which Marshall considered sacred. At the same time, even his obstinate loyalty to "the intentions of the framers" was not impervious to facts nor unwilling to come to terms with them, and a growing number of his associates were ready to go considerably farther.

While the agitation in Congress against the Court was at its height, Marshall handed down his decision in *Gibbons vs. Ogden*, and shortly after, that in *Osborn vs. United States Bank*.<sup>1</sup> In the latter case, which was initiated by the Bank, the plaintiff in error, who was Treasurer of the State of Ohio, brought forward Article XI of the Amendments to the Constitution as a bar to the action, but Marshall held that this Amendment did not prevent a state officer from being sued for acts

<sup>1</sup> 9 Wheaton, 738.



done in excess of his rightful powers. He also reiterated and amplified the principles of *M'Culloch vs. Maryland*. Three years later he gave his opinions in *Brown vs. Maryland* and *Ogden vs. Saunders*.<sup>1</sup> In the former Marshall's opinion was dissented from by a single associate, but in the latter the Chief Justice found himself for the first and only time in his entire incumbency in the rôle of dissenter in a constitutional case. The decision of the majority, speaking through Justice Washington, laid down the principle that the obligation of a private executory contract cannot be said to be "impaired" in a constitutional sense by the adverse effect of legislative acts antedating the making of the contract; and thus the dangerous ambiguity of *Sturges vs. Crownshield* was finally resolved in favor of the States.

In the course of the next few years the Court, speaking usually through the Chief Justice, decided several cases on principles favoring local interest, sometimes indeed curtailing the operation of previously established principles. For example, the Court held that, in the absence of specific legislation by Congress to the contrary, a State may erect a dam across navigable waters of the

<sup>1</sup> 12 Wheaton. 213.

United States for local purposes<sup>1</sup>; that the mere grant of a charter to a corporation does not prevent the State from taxing such corporation on its franchises, notwithstanding that "the power to tax involves the power to destroy"<sup>2</sup>; that the Federal Courts have no right to set a state enactment aside on the ground that it had divested vested rights, unless it had done so through impairing the obligation of contracts<sup>3</sup>; that the first eight Amendments to the Constitution do not limit state power, but only Federal power<sup>4</sup>; that decisions adverse to state laws must have the concurrence of a majority of the Court.<sup>5</sup>

Despite all these concessions which he made to the rising spirit of the times, Marshall found his last years to be among the most trying of his chief justiceship. Jackson, who was now President, felt himself the chosen organ of "the People's will" and was not disposed to regard as binding anybody's interpretation of the Constitution except his own. The West and Southwest, the pocket boroughs of

<sup>1</sup> *Wilson vs. Blackbird Creek Marsh Company* (1829), 2 Peters, 245.

<sup>2</sup> *Providence Bank vs. Billings* (1830), 4 Peters, 514.

<sup>3</sup> *Satterlee vs. Matthewson* (1829), 2 Peters, 380; and *Watson vs. Mercer* (1834), 8 Peters, 110.

<sup>4</sup> *Barron vs. Baltimore* (1833), 7 Peters, 243.

<sup>5</sup> See in this connection the Chief Justice's remarks in *Briscoe vs. Bank of Kentucky*, 8 Peters, 118.

the new Administration, were now deep in land speculation and clamorous for financial expedients which the Constitution banned. John Taylor of Caroline had just finished his task of defining the principles of constitutional construction which were requisite to convert the Union into a league of States and had laid his work at the feet of Calhoun. Taylor was a candid man and frankly owned the historical difficulties in the way of carrying out his purpose; but Calhoun's less scrupulous dialectic swept aside every obstacle that stood in the way of attributing to the States the completest sovereignty.

In *Craig vs. Missouri* (1830)<sup>1</sup> the Court was confronted with a case in which a State had sought to evade the prohibition of the Constitution against the emission of bills of credit by establishing loan offices with authority to issue loan certificates intended to circulate generally in dimensions of fifty cents to ten dollars and to be receivable for taxes. A plainer violation of the Constitution would be difficult to imagine. Yet Marshall's decision setting aside the act was followed by a renewed effort to procure the repeal of Section xxv of the Judiciary Act. The discussion of the proposal

<sup>1</sup> 4 Peters, 410.

threw into interesting contrast two points of view. The opponents of this section insisted upon regarding constitutional cases as controversies between the United States and the States in their corporate capacities; its advocates, on the other hand, treated the section as an indispensable safeguard of private rights. In the end, the latter point of view prevailed: the bill to repeal, which had come up in the House, was rejected by a vote of 138 to 51, and of the latter number all but six came from Southern States, and more than half of them from natives of Virginia.

Meantime the Supreme Court had become involved in controversy with Georgia on account of a series of acts which that State had passed extending its jurisdiction over the Cherokee Indians in violation of the national treaties with this tribe. In *Corn Tassel's* case, the appellant from the Georgia court to the United States Supreme Court was hanged in defiance of a writ of error from the Court. In *Cherokee Nation vs. Georgia*, the Court itself held that it had no jurisdiction. Finally, in 1832, in *Worcester vs. Georgia*,<sup>1</sup> the Court was confronted squarely with the question of the validity of the Georgia acts. The State put in no appearance,

<sup>1</sup> 6 Peters, 515.

the acts were pronounced void, and the decision went unenforced. When Jackson was asked what effort the Executive Department would make to back up the Court's mandate, he is reported to have said: "John Marshall has made his decision; now let him enforce it."

Marshall began to see the Constitution and the Union crumbling before him. "I yield slowly and reluctantly to the conviction," he wrote Story, late in 1832, "that our Constitution cannot last. . . . Our opinions [in the South] are incompatible with a united government even among ourselves. The Union has been prolonged this far by miracles." A personal consideration sharpened his apprehension. He saw old age at hand and was determined "not to hazard the disgrace of continuing in office a mere inefficient pageant," but at the same time he desired some guarantee of the character of the person who was to succeed him. At first he thought of remaining until after the election of 1832; but Jackson's reelection made him relinquish altogether the idea of resignation.

A few months later, in consequence of the Administration's vigorous measures against nullification in South Carolina, things were temporarily wearing a brighter aspect. Yet that the fundamental elements

of the situation had been thereby altered, Marshall did not believe. "To men who think as you and I do," he wrote Story, toward the end of 1834, "the present is gloomy enough; and the future presents no cheering prospect. In the South . . . those who support the Executive do not support the Government. They sustain the personal power of the President, but labor incessantly to impair the legitimate powers of the Government. Those who oppose the rash and violent measures of the Executive . . . are generally the bitter enemies of Constitutional Government. Many of them are the avowed advocates of a league; and those who do not go the whole length, go a great part of the way. What can we hope for in such circumstances?"

Yet there was one respect in which the significance of Marshall's achievement must have been as clear to himself as it was to his contemporaries. He had failed for the time being to establish his definition of national power, it is true, but he had made the Supreme Court one of the great political forces of the country. The very ferocity with which the pretensions of the Court were assailed in certain quarters was indirect proof of its power, but there was also direct testimony of a high order.

In 1830 Alexis de Tocqueville, the French statesman, visited the United States just as the rough frontier democracy was coming into its own. Only through the Supreme Court, in his opinion, were the forces of renewal and growth thus liberated to be kept within the bounds set by existing institutions. "The peace, the prosperity, and the very existence of the Union," he wrote, "are vested in the hands of the seven Federal judges. Without them the Constitution would be a dead letter: the Executive appeals to them for assistance against the encroachments of the legislative power; the Legislature demands their protection against the assaults of the Executive; they defend the Union from the disobedience of the States, the States from the exaggerated claims of the Union, the public interest against private interests and the conservative spirit of stability against the fickleness of the democracy." The contrast between these observations and the disheartened words in which Jay declined renomination to the chief justiceship in 1801 gives perhaps a fair measure of Marshall's accomplishment.

Of the implications of the accomplishment of the great Chief Justice for the political life of the country, let De Tocqueville speak again: "Scarcely any



political question arises in the United States which is not resolved sooner, or later, into a judicial question. Hence all parties are obliged to borrow in their daily controversies the ideas, and even the language peculiar to judicial proceedings. . . . The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate."

In one respect, however, De Tocqueville erred. American "legalism," that curious infusion of politics with jurisprudence, that mutual consultation of public opinion and established principles, which in the past has so characterized the course of discussion and legislation in America, is traceable to origins long antedating Marshall's chief justiceship. On the other hand, there is no public career in American history which ever built so largely upon this pervasive trait of the national outlook as did Marshall's, or which has contributed so much to render it effective in palpable institutions.

## CHAPTER VIII

### AMONG FRIENDS AND NEIGHBORS

It is a circumstance of no little importance that the founder of American Constitutional Law was in tastes and habit of life a simple countryman. To the establishment of National Supremacy and the Sanctity of Contracts Marshall brought the support not only of his office and his command of the art of judicial reasoning but also the whole-souled democracy and unpretentiousness of the fields. And it must be borne in mind that Marshall was on view before his contemporaries as a private citizen rather more of the time, perhaps, than as Chief Justice. His official career was, in truth, a somewhat leisurely one. Until 1827 the term at Washington rarely lasted over six weeks and subsequently not over ten weeks. In the course of his thirty-four years on the Bench, the Court handed down opinions in over 1100 cases, which is probably about four times the number of

opinions now handed down at a single term; and of this number Marshall spoke for the Court in about half the cases. Toward the middle of March, he left Washington for Richmond, and on the 22d of May opened court in his own circuit. Then, three weeks later, if the docket permitted, he went on to Raleigh to hold court there for a few days. The summers he usually spent on the estate which he inherited from his father at Fauquier, or else he went higher up into the mountains to escape malaria. But by the 22d of November at the latest he was back once more in Richmond for court, and at the end of December for a second brief term he again drove to Raleigh in his high-wheeled gig. With his return to Washington early in February he completed the round of his judicial year.

The entire lack of pageantry and circumstance which attended these journeyings of his is nowhere more gaily revealed than in the following letter to his wife, which is now published for the first time through the kindness of Mr. Beveridge:

RAWLEIGH, Jan.<sup>y</sup> 2<sup>d</sup>, 1803.

MY DEAREST POLLY

You will laugh at my vexation when you hear the various calamities that have befallen me. In the first place when I came to review my funds, I had the mortification

to discover that I had lost 15 silver dollars out of my waist coat pocket. They had worn through the various mendings the pocket had sustained and sought their liberty in the sands of Carolina.

I determined not to vex myself with what could not be remedied & ordered Peter to take out my cloaths that I might dress for court when to my astonishment & grief after fumbling several minutes in the portman-teau, starting [sic] at vacancy, & sweating most profusely he turned to me with the doleful tidings that I had no pair of breeches. You may be sure this piece of intelligence was not very graciously received; however, after a little scolding, I determined to make the best of my situation & immediately set out to get a pair made.

I thought I should be a sans-culotte only one day & that for the residue of the term I might be well enough dressed for the appearance on the first day to be forgotten.

But, the greatest of evils, I found, was followed by still greater. Not a taylor in town could be prevailed on to work for me. They were all so busy that it was impossible to attend to my wants however pressing they might be, & I have the extreme mortification to pass the whole time without that important article of dress I have mentioned. I have no alleviation for this misfortune but the hope that I shall be enabled in four or five days to commence my journey homeward & that I shall have the pleasure of seeing you & our dear children in eight or nine days after this reaches you.

In the meantime, I flatter myself that you are well and happy.

Adieu my dearest Polly

I am your own affectionate,

J. MARSHALL.

Marshall erected his Richmond home, called "Shockoe Hill," in 1793 on a plot of ground which he had purchased four years earlier. Here, as his eulogist has said, was "the scene of his real triumphs." At an early date his wife became a nervous invalid, and his devotion to her brought out all the finest qualities of his sound and tender nature. "It is," says Mr. Beveridge, "the most marked characteristic of his entire private life and is the one thing which differentiates him sharply from the most eminent men of that heroic but socially free-and-easy period." From his association with his wife Marshall derived, moreover, an opinion of the sex "as the friends, the companions, and the equals of man" which may be said to have furnished one of his few points of sympathetic contact with American political radicalism in his later years. The satirist of woman, says Story, "found no sympathy in his bosom," and "he was still farther above the commonplace flatteries by which frivolity seeks to administer aliment to personal vanity, or vice to make its approaches for baser purposes. He spoke to the sex when present, as he spoke of them when absent, in language of just appeal to their understandings, their tastes, and their duties."

Marshall's relations with his neighbors were the happiest possible. Every week, when his judicial duties permitted or the more "laborious relaxation" of directing his farm did not call him away, he attended the meetings of the Barbecue Club in a fine grove just outside the city, to indulge in his favorite diversion of quoits. The Club consisted of thirty of the most prominent men of Richmond, judges, lawyers, doctors, clergymen, and merchants. To quoits was added the inducement of an excellent repast of which roast pig was the *pièce de résistance*. Then followed a dessert of fruit and melons, while throughout a generous stock of porter, toddy, and of punch "from which water was carefully excluded," was always available to relieve thirst. An entertaining account of a meeting of the Club at which Marshall and his friend Wickham were the caterers has been thus preserved for us:

At the table Marshall announced that at the last meeting two members had introduced politics, a forbidden subject, and had been fined a basket of champagne, and that this was now produced, as a warning to evil-doers; as the club seldom drank this article, they had no champagne glasses, and must drink it in tumblers. Those who played quoits retired after a while for a game. Most of the members had smooth, highly polished brass quoits. But Marshall's were large, rough, heavy, and

of iron, such as few of the members could throw well from hub to hub. Marshall himself threw them with great success and accuracy, and often "rang the meg." On this occasion Marshall and the Rev. Mr. Blair led the two parties of players. Marshall played first, and rang the meg. Parson Blair did the same, and his quoit came down plumply on top of Marshall's. There was uproarious applause, which drew out all the others from the dinner; and then came an animated controversy as to what should be the effect of this exploit. They all returned to the table, had another bottle of champagne, and listened to arguments, one from Marshall, pro se, and one from Wickham for Parson Blair. [Marshall's] argument is a humorous companion piece to any one of his elaborate judicial opinions. He began by formulating the question, "Who is winner when the adversary quoits are on the meg at the same time?" He then stated the facts, and remarked that the question was one of the true construction and applications of the rules of the game. The first one ringing the meg has the advantage. No other can succeed who does not begin by displacing this first one. The parson, he willingly allowed, deserves to rise higher and higher in everybody's esteem; but then he mustn't do it by getting on another's back in this fashion. That is more like leapfrog than quoits. Then, again, the legal maxim, *Cujus est solum, ejus est usque ad cælum* — his own right as first occupant extends to the vault of heaven; no opponent can gain any advantage by squatting on his back. He must either bring a writ of ejectment, or drive him out *vi et armis*. And then, after further argument of the same sort, he asked judgment, and sat down amidst great applause.



Mr. Wickham then rose, and made an argument of a similar pattern. No rule, he said, requires an impossibility. Mr. Marshall's quoit is twice as large as any other; and yet it flies from his arm like the iron ball at the Grecian games from the arm of Ajax. It is impossible for an ordinary quoit to move it. With much more of the same sort, he contended that it was a drawn game. After very animated voting, designed to keep up the uncertainty as long as possible, it was so decided. Another trial was had, and Marshall clearly won.<sup>1</sup>

Years later Chester Harding, who once painted Marshall, visited the Club. "I watched," says he, "for the coming of the old chief. He soon approached, with his coat on his arm and his hat in his hand, which he was using as a fan. He walked directly up to a large bowl of mint julep which had been prepared, and drank off a tumblerful, smacking his lips, and then turned to the company with a cheerful 'How are you, gentlemen?' He was looked upon as the best pitcher of the party and could throw heavier quoits than any other member of the club. The game began with great animation. There were several ties; and before long I saw the great Chief Justice of the United States

<sup>1</sup> J. B. Thayer, *John Marshall* (Riverside Biographical Series, 1904), pp. 134-36, paraphrasing G. W. Munford, *The Two Parsons* (Richmond, 1884), pp. 326-38.

down on his knees measuring the contested distance with a straw, with as much earnestness as if it had been a point of law; and if he proved to be in the right, the woods would ring with his triumphant shout.”<sup>1</sup> What Wellesley remarked of the younger Pitt may be repeated of Marshall, that “unconscious of his superiority,” he “plunged heedlessly into the mirth of the hour” and was endowed with “a gay heart and social spirit beyond any man of his time.”

As a hero of anecdotes Marshall almost rivals Lincoln. Many of the tales preserved are doubtless apocryphal, but this qualification hardly lessens their value as contemporary impressions of his character and habits. They show for what sort of anecdotes his familiarly known personality had an affinity.

The Chief Justice’s entire freedom from ostentation and the gentleness with which he could rebuke it in others is illustrated in a story often told. Going early to the market one morning he came upon a youth who was fuming and swearing because he could get no one to carry his turkey home for him. Marshall proffered his services. Arriving at the house the young man asked, “What shall I

<sup>1</sup> Thayer, *op. cit.*, pp. 132-33.

pay you?" "Oh, nothing," was the reply; "it was on my way, and no trouble." As Marshall walked away, the young man inquired of a bystander, "Who is that polite old man that brought home my turkey for me?" "That," was the answer, "is Judge Marshall, Chief Justice of the United States."

Of the same general character is an anecdote which has to do with a much earlier period when Marshall was still a practicing attorney. An old farmer who was involved in a lawsuit came to Richmond to attend its trial. "Who is the best lawyer in Richmond?" he asked of his host, the innkeeper of the Eagle tavern. The latter pointed to a tall, ungainly, bareheaded man who had just passed, eating cherries from his hat and exchanging jests with other loiterers like himself. "That is he," said the innkeeper; "John Marshall is his name." But the old countryman, who had a hundred dollars in his pocket, proposed to spend it on something more showy and employed a solemn, black-coated, and much powdered bigwig. The latter turned out in due course to be a splendid illustration of the proverb that "fine feathers do not make fine birds." This the crestfallen rustic soon discovered. Meantime he had listened with amazement and growing admiration to an argument by

Marshall in a cause which came on before his own. He now went up to Marshall and, explaining his difficulty, offered him the five dollars which the exactions of the first attorney still left him, and besought his aid. With a humorous remark about the power of a black coat and powdered wig Marshall good-naturedly accepted the retainer.

The religious bent of the Chief Justice's mind is illustrated in another story, which tells of his arriving toward the close of day at an inn in one of the counties of Virginia, and falling in with some young men who presently began ardently to debate the question of the truth or falsity of the Christian religion. From six until eleven o'clock the young theologians argued keenly and ably on both sides of the question. Finally one of the bolder spirits exclaimed that it was impossible to overcome prejudices of long standing and, turning to the silent visitor, asked: "Well, my old gentleman, what do you think of these things?" To their amazement the "old gentleman" replied for an hour in an eloquent and convincing defense of the Christian religion, in which he answered in order every objection the young men had uttered. So impressive was the simplicity and loftiness of his discourse that the erstwhile critics were completely silenced.

In truth, Marshall's was a reverent mind, and it sprang instinctively to the defense of ideas and institutions whose value had been tested. Unfortunately, in his *Life of Washington* Marshall seems to have given this propensity a somewhat undue scope. There were external difficulties in dealing with such a subject apart from those inherent in a great biography, and Marshall's volumes proved to be a general disappointment. Still hard pressed for funds wherewith to meet his Fairfax investment, he undertook this work shortly after he became Chief Justice, at the urgent solicitation of Judge Bushrod Washington, the literary executor of his famous uncle. Marshall had hoped to make this incursion into the field of letters a very remunerative one, for he and Washington had counted on some thirty thousand subscribers for the work. The publishers however, succeeded in obtaining only about a quarter of that number, owing partly at least to the fact that Jefferson had no sooner learned of the enterprise than his jealous mind conceived the idea that the biography must be intended for partisan purposes. He accordingly gave the alarm to the Republican press and forbade the Federal postmasters to take orders for the book. At the same time he asked his friend Joel Barlow, then

residing in Paris, to prepare a counterblast, for which he declared himself to be "rich in materials." The author of the *Columbiad*, however, declined this hazardous commission, possibly because he was unwilling to stand sponsor for the malicious recitals that afterwards saw light in the pages of the *Anas*.

But apart from this external opposition to the biography, Marshall found a source of even keener disappointment in the literary defects due to the haste with which he had done his work. The first three volumes had appeared in 1804, the fourth in 1805, and the fifth, which is much the best, in 1807. Republican critics dwelt with no light hand upon the deficiencies of these volumes, and Marshall himself sadly owned that the "inelegancies" in the first were astonishingly numerous. But the shortcomings of the work as a satisfactory biography are more notable than its lapses in diction. By a design apparently meant to rival the improvisations of *Tristram Shandy*, the birth of the hero is postponed for an entire volume, in which the author traces the settlement of the country. At the opening of the second volume "the birth of young Mr. Washington" is gravely announced, to be followed by an account of the Father of his Country so devoid of intimate touches that it might easily have

been written by one who had never seen George Washington.

Nevertheless, these pages of Marshall's do not lack acute historical judgments. He points out, for instance, that, if the Revolution had ended before the Articles of Confederation were adopted, permanent disunion might have ensued and that, faulty as it was, the Confederation "preserved the idea of Union until the good sense of the Nation adopted a more efficient system." Again, in his account of the events leading up to the Convention of 1787, Marshall rightly emphasizes facts which subsequent writers have generally passed by with hardly any mention, so that students may read this work with profit even today. But the chief importance of these volumes lay, after all, in the additional power which the author himself derived from the labor of their preparation. In so extensive an undertaking Marshall received valuable training for his later task of laying the foundations of Constitutional Law in America. One of his chief assets on the bench, as we have already seen, was his complete confidence in his own knowledge of the intentions of the Constitution — a confidence which was grounded in the consciousness that he had written the history of the Constitution's framing.



Most of Marshall's correspondence, which is not voluminous, deals with politics or legal matters. But there are letters in which the personal side of the Chief Justice is revealed. He gives his friend Story a touching account of the loss of two of his children. He praises old friends and laments his inability to make new ones. He commends Jane Austen, whose novels he has just finished reading. "Her flights," he remarks, "are not lofty, she does not soar on eagle's wings, but she is pleasing, interesting, equable, and yet amusing." He laments that he "can no longer debate and yet cannot apply his mind to anything else." One recalls Darwin's similar lament that his scientific work had deprived him of all liking for poetry.

The following letter, which Marshall wrote the year before his death to his grandson, a lad of fourteen or fifteen, is interesting for its views on a variety of subjects and is especially pleasing for its characteristic freedom from condescension:

I had yesterday the pleasure of receiving your letter of the 29th of November, and am quite pleased with the course of study you are pursuing. Proficiency in Greek and Latin is indispensable to an accomplished scholar, and may be of great real advantage in our progress through human life. Cicero deserves to be studied still more for his talents than for the improvement in language

to be derived from reading him. He was unquestionably, with the single exception of Demosthenes, the greatest orator among the ancients. He was too a profound Philosopher. His "*de officiis*" is among the most valuable treatises I have ever seen in the Latin language.

History is among the most essential departments of knowledge; and, to an American, the histories of England and of the United States are most instructive. Every man ought to be intimately acquainted with the history of his own country. Those of England and of the United States are so closely connected that the former seems to be introductory to the latter. They form one whole. Hume, as far as he goes, to the revolution of 1688, is generally thought the best Historian of England. Others have continued his narrative to a late period, and it will be necessary to read them also.

There is no exercise of the mind from which more valuable improvement is to be drawn than from composition. In every situation of life the result of early practice will be valuable. Both in speaking and writing, the early habit of arranging our thoughts with regularity, so as to point them to the object to be proved, will be of great advantage. In both, clearness and precision are most essential qualities. The man who by seeking embellishment hazards confusion, is greatly mistaken in what constitutes good writing. The meaning ought never to be mistaken. Indeed the readers should never be obliged to search for it. The writer should always express himself so clearly as to make it impossible to misunderstand him. He should be comprehended without an effort.

The first step towards writing and speaking clearly is

to think clearly. Let the subject be perfectly understood, and a man will soon find words to convey his meaning to others. Blair, whose lectures are greatly and justly admired, advises a practice well worthy of being observed. It is to take a page of some approved writer and read it over repeatedly until the matter, not the words, be fully impressed on the mind. Then write, in your own language, the same matter. A comparison of the one with the other will enable you to remark and correct your own defects. This course may be pursued after having made some progress in composition. In the commencement, the student ought carefully to re-peruse what he has written, correct, in the first instance, every error of orthography and grammar. A mistake in either is unpardonable. Afterwards revise and improve the language.

I am pleased with both your pieces of composition. The subjects are well chosen and of the deepest interest. Happiness is pursued by all, though too many mistake the road by which the greatest good is to be successfully followed. Its abode is not always in the palace or the cottage. Its residence is the human heart, and its inseparable companion is a quiet conscience. Of this, Religion is the surest and safest foundation. The individual who turns his thoughts frequently to an omnipotent omniscient and all perfect being, who feels his dependence on, and his infinite obligations to that being will avoid that course of life which must harrow up the conscience.

Marshall was usually most scrupulous to steer clear of partisan politics both in his letters and in

his conversation, so that on one occasion he was much aroused by a newspaper article which had represented him "as using language which could be uttered only by an angry party man." But on political issues of a broader nature he expressed himself freely in the strict privacy of correspondence at least, and sometimes identified himself with public movements, especially in his home State. For instance, he favored the gradual abolition of slavery by private emancipation rather than by governmental action. In 1823 he became first president of the Richmond branch of the Colonization Society; five years later he presided over a convention to promote internal improvements in Virginia; and in 1829 he took a prominent part in the deliberations of the State Constitutional Convention.

In the broader matters of national concern his political creed was in thorough agreement with his constitutional doctrine. Nullification he denounced as "wicked folly," and he warmly applauded Jackson's proclamation of warning to South Carolina. But Marshall regarded with dismay Jackson's aggrandizement of the executive branch, and the one adverse criticism he has left of the Constitution is of the method provided for the election of the President. In this connection

he wrote in 1830: "My own private mind has been slowly and reluctantly advancing to the belief that the present mode of choosing the Chief Magistrate threatens the most serious danger to the public happiness. The passions of men are influenced to so fearful an extent, large masses are so embittered against each other, that I dread the consequences. . . . Age is, perhaps, unreasonably timid. Certain it is that I now dread consequences that I once thought imaginary. I feel disposed to take refuge under some less turbulent and less dangerous mode of choosing the Chief Magistrate." Then follows the suggestion that the people of the United States elect a body of persons equal in number to one-third of the Senate and that the President be chosen from among this body by lot. Marshall's suggestion seems absurd enough today, but it should be remembered that his fears of national disorder as a result of strong party feeling at the time of presidential elections were thoroughly realized in 1860 when Lincoln's election led to secession and civil war, and that sixteen years later, in the Hayes-Tilden contest, a second dangerous crisis was narrowly averted.

In the campaign of 1832 Marshall espoused privately the cause of Clay and the United States

Bank, and could not see why Virginia should not be of the same opinion. Writing to Story in the midst of the campaign he said: "We are up to the chin in politics. Virginia was always insane enough to be opposed to the Bank of the United States, and therefore hurrahs for the veto. But we are a little doubtful how it may work in Pennsylvania. It is not difficult to account for the part New York may take. She has sagacity enough to see her interests in putting down the present Bank. Her mercantile position gives her a control, a commanding control, over the currency and the exchanges of the country, if there be no Bank of the United States. Going for herself she may approve this policy; but Virginia ought not to drudge for her." To the end of his days Marshall seems to have refused to recognize that the South had a sectional interest to protect, or at least that Virginia's interests were sectional; her attachment to State Rights he assigned to the baneful influence of Jeffersonianism.

The year 1831 dealt Marshall two severe blows. In that year his robust constitution manifested the first signs of impairment, and he was forced to undergo an operation for stone. In the days before anæsthetics, such an operation, especially in the

case of a person of his advanced years, was attended with great peril. He faced the ordeal with the utmost composure. His physician tells of visiting Marshall the morning he was to submit to the knife and of finding him at breakfast:

He received me with a pleasant smile . . . and said, "Well, Doctor, you find me taking breakfast, and I assure you I have had a good one. I thought it very probable that this might be my last chance, and therefore I was determined to enjoy it and eat heartily." . . . He said that he had not the slightest desire to live, laboring under the sufferings to which he was subjected, and that he was perfectly ready to take all the chances of an operation, and he knew there were many against him. . . . After he had finished his breakfast, I administered him some medicine; he then inquired at what hour the operation would be performed. I mentioned the hour of eleven. He said "Very well; do you wish me for any other purpose, or may I lie down and go to sleep?" I was a good deal surprised at this question, but told him that if he could sleep it would be very desirable. He immediately placed himself upon the bed and fell into a profound sleep, and continued so until I was obliged to rouse him in order to undergo the operation. He exhibited the same fortitude, scarcely uttering a murmur throughout the whole procedure which, from the nature of his complaint, was necessarily tedious.

The death of his wife on Christmas Day of the same year was a heavy blow. Despite her



invalidism, she was a woman of much force of character and many graces of mind, to which Marshall rendered touching tribute in a quaint eulogy composed for one of his sons on the first anniversary of her death:

Her judgment was so sound and so safe that I have often relied upon it in situations of some perplexity. . . . Though serious as well as gentle in her deportment, she possessed a good deal of chaste, delicate, and playful wit, and if she permitted herself to indulge this talent, told her little story with grace, and could mimic very successfully the peculiarities of the person who was its subject. She had a fine taste for belle-lettre reading. . . . This quality, by improving her talents for conversation, contributed not inconsiderably to make her a most desirable and agreeable companion. It beguiled many of those winter evenings during which her protracted ill health and her feeble nervous system confined us entirely to each other. I shall never cease to look back on them with deep interest and regret. . . . She felt deeply the distress of others, and indulged the feeling liberally on objects she believed to be meritorious. . . . She was a firm believer in the faith inculcated by the Church in which she was bred, but her soft and gentle temper was incapable of adopting the gloomy and austere dogmas which some of its professors have sought to engraft on it.

Marshall believed women were the intellectual equals of men, because he was convinced that they

possessed in a high degree "those qualities which make up the sum of human happiness and transform the domestic fireside into an elysium," and not because he thought they could compete on even terms in the usual activities of men.

Despite these "buffetings of fate," the Chief Justice was back in Washington in attendance upon Court in February, 1832, and daily walked several miles to and from the Capitol. In the following January his health appeared to be completely restored. "He seemed," says Story, with whom he messed, along with Justices Thompson and Duval, "to revive, and enjoy anew his green old age." This year Marshall had the gratification of receiving the tribute of Story's magnificent dedication of his *Commentaries* to him. With characteristic modesty, the aged Chief Justice expressed the fear that his admirer had "consulted a partial friendship farther than your deliberate judgment will approve." He was especially interested in the copy intended for the schools, but he felt that "south of the Potomac, where it is most wanted it will be least used," for, he continued, "it is a Mohammedan rule never to dispute with the ignorant, and we of the true faith in the South adjure the contamination of infidel political works. It

would give our orthodox nullifier a fever to read the heresies of your Commentaries. A whole school might be infected by the atmosphere of a single copy should it be placed on one of the shelves of a bookcase."

Marshall sat on the Bench for the last time in the January term of 1835. Miss Harriet Martineau, who was in Washington during that winter, has left a striking picture of the Chief Justice as he appeared in these last days. "How delighted," she writes, "we were to see Judge Story bring in the tall, majestic, bright-eyed old man, — old by chronology, by the lines on his composed face, and by his services to the republic; but so dignified, so fresh, so present to the time, that no compassionate consideration for age dared mix with the contemplation of him."

Marshall was, however, a very sick man, suffering constant pain from a badly diseased liver. The ailment was greatly aggravated, moreover, by "severe contusions" which he received while returning in the stage from Washington to Richmond. In June he went a second time to Philadelphia for medical assistance, but his case was soon seen to be hopeless. He awaited death with his usual serenity, and two days before it came he composed the

modest epitaph which appeared upon his tomb: JOHN MARSHALL, SON OF THOMAS AND MARY MARSHALL, WAS BORN ON THE 24TH OF SEPTEMBER, 1755, INTERMARRIED WITH MARY WILLIS AMBLER THE 3D OF JANUARY, 1783, DEPARTED THIS LIFE THE — DAY OF —, 18 — . He died the evening of July 6, 1835, surrounded by three of his sons. The death of the fourth, from an accident while he was hurrying to his father's bedside, had been kept from him. He left also a daughter and numerous grandchildren.

Marshall's will is dated April 9, 1832, and has five codicils of subsequent dates attached. After certain donations to grandsons named John and Thomas, the estate, consisting chiefly of his portion of the Fairfax purchase, was to be divided equally among his five children. To the daughter and her descendants were also secured one hundred shares of stock which his wife had held in the Bank of the United States, but in 1835 these were probably of little value. His faithful body servant Robin was to be emancipated and, if he chose, sent to Liberia, in which event he should receive one hundred dollars. But if he preferred to remain in the Commonwealth, he should receive but fifty dollars; and if it turned out to "be impracticable to liberate

him consistently with law and his own inclination," he was to select his master from among the children, "that he may always be treated as a faithful meritorious servant."

The Chief Justice's death evoked many eloquent tributes to his public services and private excellencies, but none more just and appreciative than that of the officers of court and members of the bar of his own circuit who knew him most intimately. It reads as follows:

John Marshall, late Chief Justice of the United States, having departed this life since the last Term of the Federal Circuit Court for this district, the Bench, Bar, and Officers of the Court, assembled at the present Term, embrace the first opportunity to express their profound and heartfelt respect for the memory of the venerable judge, who presided in this Court for thirty-five years — with such remarkable diligence in office, that, until he was disabled by the disease which removed him from life, he was never known to be absent from the bench, during term time, even for a day, — with such indulgence to counsel and suitors, that every body's convenience was consulted, but his own, — with a dignity, sustained without effort, and, apparently, without care to sustain it, to which all men were solicitous to pay due respect, — with such profound sagacity, such quick penetration, such acuteness, clearness, strength, and comprehension of mind, that in his hand, the most complicated causes were plain, the weightiest

and most difficult, easy and light, — with such striking impartiality and justice, and a judgment so sure, as to inspire universal confidence, so that few appeals were ever taken from his decisions, during his long administration of justice in the Court, and those only in cases where he himself expressed doubt, — with such modesty, that he seemed wholly unconscious of his own gigantic powers, — with such equanimity, such benignity of temper, such amenity of manners, that not only none of the judges, who sat with him on the bench, but no member of the bar, no officer of the court, no juror, no witness, no suitor, in a single instance, ever found or imagined, in any thing said or done, or omitted by him, the slightest cause of offence.

His private life was worthy of the exalted character he sustained in public station. The unaffected simplicity of his manners; the spotless purity of his morals; his social, gentle, cheerful disposition; his habitual self-denial, and boundless generosity towards others; the strength and constancy of his attachments; his kindness to his friends and neighbours; his exemplary conduct in the relations of son, brother, husband, father; his numerous charities; his benevolence towards all men, and his ever active beneficence; these amiable qualities shone so conspicuously in him, throughout his life, that, highly as he was respected, he had the rare happiness to be yet more beloved.

There is no more engaging figure in American history, none more entirely free from disfiguring idiosyncrasy, than the son of Thomas Marshall.

## CHAPTER IX

### EPILOGUE

IN the brief period of twenty-seven months following the death of Marshall the Supreme Court received a new Chief Justice and five new Associate Justices. The effect of this change in personnel upon the doctrine of the Court soon became manifest. In the eleventh volume of Peters's *Reports*, the first issued while Roger B. Taney was Chief Justice, are three decisions of constitutional cases sustaining state laws which on earlier argument Marshall had assessed as unconstitutional. The first of these decisions gave what was designated "the complete, unqualified, and exclusive" power of the State to regulate its "internal police" the right of way over the "commerce clause"<sup>1</sup>; the second practically nullified the constitutional prohibition against "bills of credit" in deference to the same high prerogative<sup>2</sup>; the third curtailed

<sup>1</sup> *Milton vs. New York*, 11 Peters, 102.

<sup>2</sup> *Briscoe vs. Bank of Kentucky*, 11 Peters, 257.



the operation of the "obligation of contracts" clause as a protection of public grants.<sup>1</sup> Story, voicing "an earnest desire to vindicate his [Marshall's] memory from the imputation of rashness," filed passionate and unavailing dissents. With difficulty he was dissuaded from resigning from a tribunal whose days of influence he thought gone by.<sup>2</sup> During the same year Justice Henry Baldwin, another of Marshall's friends and associates, published his *View of the Constitution*, in which he rendered high praise to the departed Chief Justice's qualifications as expounder of the Constitution. "No commentator," he wrote, "ever followed the text more faithfully, or ever made a commentary more accordant with its strict intention and language. . . . He never brought into action the powers of his mighty mind to find some meaning in plain words . . . above the comprehension of ordinary minds. . . . He knew the framers of the Constitution, who were his compatriots," he was

<sup>1</sup> *Charles River Bridge Company vs. Warren Bridge Company*, 11 Peters, 420.

<sup>2</sup> He wrote Justice McLean, May 10, 1837: "There will not, I fear, even in our day, be any case in which a law of a State or of Congress will be declared unconstitutional; for the old constitutional doctrines are fast fading away." *Life and Letters of Joseph Story*, vol. II, p. 272; see also p. 270, for Chancellor Kent's unfavorable reaction to these decisions.

himself the historian of its framing, wherefore, as its expositor, "he knew its objects, its intentions." Yet in the face of these admissions, Baldwin rejects Marshall's theory of the origin of the Constitution and the corollary doctrine of liberal construction. "The history and spirit of the times," he wrote, "admonish us that new versions of the Constitution will be promulgated to meet the varying course of political events or aspirations of power."

But the radical impulse soon spent itself. Chief Justice Taney himself was a good deal of a conservative. While he regarded the Supreme Court rather as an umpire between two sovereignties than as an organ of the National Government for the vigorous assertion of its powers, which was Marshall's point of view, Taney was not at all disposed to disturb the law as it had been declared by his predecessor in binding decisions. Then, too, the development of railroading and the beginning of immigration from Europe on a large scale reawakened the interest of a great part of the nation in keeping intercourse between the States untrammelled by local selfishness; and in 1851 the Court, heeding the spirit of compromise of the day, decisively accepted for the most important category of cases Marshall's

principle of the exclusive control of interstate and foreign commerce by Congress.<sup>1</sup>

Still, until the eve of the Civil War, the theory of the Constitution held by the great body of the people, North as well as South, was that it was a compact of States. Then in December, 1860, South Carolina announced her secession from the Union. Buchanan's message of the same month performed the twofold service of refuting secession on State Rights principles and of demonstrating, albeit unwittingly, how impossible it was practically to combat the movement on the same principles. Lincoln brought the North back to Marshall's position when he remarked in his Inaugural Address: "Continue to execute all the express provisions of our National Constitution, and the Union will endure forever."

The Civil War has been characterized as "an appeal from the judgments of Marshall to the arbitrament of war." Its outcome restored the concept of the National Government as a territorial sovereign, present within the States by the superior mandate of the American People, and entitled to "execute on every foot of American soil the powers and functions that belong to

<sup>1</sup> *Cooley vs. the Board of Wardens*, 12 Howard, 299.

it.”<sup>1</sup> These powers and functions are, moreover, today undergoing constant enlargement. No one now doubts that in any clash between national and state power it is national power which is entitled to be defined first, and few persons question that it ought to be defined in the light of Marshall’s principle, that a Constitution designed for ages to come must be “adapted to the various crises of human affairs.”

It is only when we turn to that branch of Constitutional Law which defines governmental power in relation to private rights that we lose touch with Marshall’s principles. As we have seen, he dealt in absolutes: either power was given to an unlimited extent or it was withheld altogether. To-day, however, the dominant rule in this field of Constitutional Law is the “rule of reason.” In the last analysis, there are few private rights which are not subordinate to the general welfare; but, on the other hand, legislation which affects private rights must have a reasonable tendency to promote the general welfare and must not arbitrarily invade the rights of particular persons or classes. Inasmuch as the hard and fast rules of an age when conditions of life were simpler are no longer practicable under

<sup>1</sup> Justice Bradley in *ex parte Siebold*, 100 U. S., 371.

the more complex relationships of modern times, there is today an inevitable tendency to force these rules to greater flexibility.<sup>1</sup>

And this difference in the point of view of the judiciary connotes a general difference of outlook which makes itself felt today even in that field where Marshall wrought most enduringly. The Constitution was established under the sway of the idea of the balance of power, and with the purpose of effecting a compromise among a variety of more or less antagonistic interests, some of which were identified with the cause of local autonomy, others of which coalesced with the cause of National Supremacy. The Nation and the States were regarded as competitive forces, and a condition of tension between them was thought to be not only normal but desirable. The modern point of view is very different. Local differences have to a great extent disappeared, and that general interest which

<sup>1</sup> Notwithstanding what is said above, it is also true that the modern doctrine of "the police power" owes something to Marshall's interpretation of the "necessary and proper" clause in *M'Culloch vs. Maryland*, which is frequently offered nowadays as stating the authoritative definition of "a fair legislative discretion" in relation to private rights. Indeed this ingenious transposition was first suggested in Marshall's day. See Cowen (N. Y.), 585. But it never received his sanction and does not represent his point of view.

is the same for all the States is an ever deepening one. The idea of the competition of the States with the Nation is yielding to that of their coöperation in public service. And it is much the same with the relation of the three departments of Government. The notion that they have antagonistic interests to guard is giving way to the perception of a general interest guarded by all according to their several faculties. In brief, whereas it was the original effort of the Constitution to preserve a somewhat complex set of values by nice differentiations of power, the present tendency, born of a surer vision of a single national welfare, is toward the participation of all powers in a joint effort for a common end.

But though Marshall's work has been superseded at many points, there is no fame among American statesmen more strongly bulwarked by great and still vital institutions. Marshall established judicial review; he imparted to an ancient legal tradition a new significance; he made his Court one of the great political forces of the country; he founded American Constitutional Law; he formulated, more tellingly than any one else and for a people whose thought was permeated with legalism, the principles on which the integrity and ordered growth

of their Nation have depended. Springing from the twin rootage of Magna Charta and the Declaration of Independence, his judicial statesmanship finds no parallel in the salient features of its achievement outside our own annals.





## BIBLIOGRAPHICAL NOTE

ALL accounts of Marshall's career previous to his appointment as Chief Justice have been superseded by Albert J. Beveridge's two admirable volumes, *The Life of John Marshall* (Boston, 1916). The author paints on a large canvas and with notable skill. His work is history as well as biography. His ample plan enables him to quote liberally from Marshall's writings and from all the really valuable first-hand sources. Both text and notes are valuable repositories of material. Beveridge has substantially completed a third volume covering the first decade of Marshall's chief-justiceship, and the entire work will probably run to five volumes.

Briefer accounts of Marshall covering his entire career will be found in Henry Flanders's *Lives and Times of the Chief Justices of the Supreme Court* (1875) and Van Santvoord's *Sketches of the Lives, Times, and Judicial Services of the Chief Justices of the Supreme Court* (1882). Two excellent brief sketches are J. B. Thayer's *John Marshall* (1901) in the *Riverside Biographical Series*, and W. D. Lewis's essay in the second volume of *The Great American Lawyers*, 8 vols. (Philadelphia, 1907), of which he is also the editor. The latter is particularly happy in its blend of the personal and legal, the biographical and critical. A. B. Magruder's *John Marshall* (1898) in the *American Statesman Series* falls

considerably below the general standard maintained by that excellent series.

The centennial anniversary of Marshall's accession to the Supreme Bench was generally observed by Bench and Bar throughout the United States, and many of the addresses on the great Chief Justice's life and judicial services delivered by distinguished judges and lawyers on that occasion were later collected by John F. Dillon and published in *John Marshall, Life, Character, and Judicial Services*, 3 vols. (Chicago, 1903). In volume XIII of the *Green Bag* will be found a skillfully constructed mosaic biography of Marshall drawn from these addresses.

The most considerable group of Marshall's letters yet published are those to Justice Story, which will be found in the *Massachusetts Historical Society Proceedings*, Second Series, volume XIV, pp. 321-60. These and most of the Chief Justice's other letters which have thus far seen the light of day will be found in J. E. Oster's *Political and Economic Doctrines of John Marshall* (New York, 1914). Here also will be found a copy of Marshall's will, of the autobiography which he prepared in 1818 for Delaplaine's *Repository* but which was never published there, and of his eulogy of his wife. The two principal sources of Marshall's anecdotes are the *Southern Literary Messenger*, volume II, p. 181 ff., and Henry Howe's *Historical Collections of Virginia* (Charleston, 1845). Approaching the value of sources are Joseph Story's *Discourse upon the Life, Character, and Services of the Hon. John Marshall* (1835) and Horace Binney's *Eulogy* (1835), both of which were pronounced by personal friends shortly after Marshall's death and both of which are now available in volume III of Dillon's

compilation, cited above. The value of Marshall's *Life of Washington* as bearing on the origin of his own point of view in politics was noted in the text (Chapter VIII).

Marshall's great constitutional decisions are, of course, accessible in the *Reports*, but they have also been assembled into a single volume by John M. Dillon, *John Marshall; Complete Constitutional Decisions* (Chicago, 1903), and into two instructively edited volumes by Joseph P. Cotton, *Constitutional Decisions of John Marshall* (New York, 1905). Story's famous *Commentaries on the Constitution* gives a systematic presentation of Marshall's constitutional doctrines, which is fortified at all points by historical reference; the second edition is the best. For other contemporary evaluations of Marshall's decisions, often hostile, see early volumes of the *North American Review* and Niles's *Register*; also the volumes of the famous John Taylor of Caroline. A brief general account of later date of the decisions is to be found in the *Constitutional History of the United States as Seen in the Development of American Law* (New York, 1889), a course of lectures before the Political Science Association of the University of Michigan. Detailed commentary of a high order of scholarship is furnished by Walter Malins Rose's *Notes to the Lawyers' Edition of the United States Reports*, 13 vols. (1899-1901). The more valuable of Marshall's decisions on circuit are collected in J. W. Brockenbrough's two volumes of *Reports of Cases Decided by the Hon. John Marshall* (Philadelphia, 1837), and his rulings at Burr's Trial are to be found in Robertson's *Reports of the Trials of Colonel Aaron Burr*, 2 vols. (1808).

Marshall's associates on the Supreme Bench are pleasingly sketched in Hampton L. Carson's *Supreme*

*Court of the United States* (Philadelphia, 1891), which also gives many interesting facts bearing on the history of the Court itself. In the same connection Charles Warren's *History of the American Bar* (Boston, 1911) is also valuable both for the facts which it records and for the guidance it affords to further material. Of biographies of contemporaries and coworkers of Marshall, the most valuable are John P. Kennedy's *Memoirs of the Life of William Wirt*, 2 vols. (Philadelphia, 1860); William Wetmore Story's *Life and Letters of Joseph Story*, 2 vols. (Boston, 1851); and William Kent's *Memoirs and Letters of James Kent* (Boston, 1898). Everett P. Wheeler's *Daniel Webster the Expounder of the Constitution* (1905) is instructive, but claims far too much for Webster's influence upon Marshall's views. New England has never yet quite forgiven Virginia for having had the temerity to take the formative hand in shaping our Constitutional Law. The vast amount of material brought together in Gustavus Myers's *History of the Supreme Court* (Chicago, 1912) is based on purely *ex parte* statements and is so poorly authenticated as to be valueless. He writes from the socialistic point of view and fluctuates between the desire to establish the dogma of "class bias" by a coldly impartial examination of the "facts" and the desire to start a scandal reflecting on individual reputations.

The literature of eulogy and appreciation is, for all practical purposes, exhausted in Dillon's collection. But a reference should be made here to a brief but pertinent and excellently phrased comment on the great Chief Justice in Woodrow Wilson's *Constitutional Government in the United States* (New York, 1908), pp. 158-9

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